92-1495

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

AMERICAN WASTE AND POLLUTION CONTROL COMPANY,

Petitioner,

versus

OUACHITA PARISH POLICE JURY,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Court Of Appeal For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. May a state court which is entertaining a breach of contract claim based on multiple theories, including an alleged violation of Section 9621(d)(3) of CERCLA, render a decision based on that federal theory alone, or does the breach of contract claim based upon that theory constitute a "controversy arising under CERCLA" which lies within the exclusive jurisdiction of the federal district courts pursuant to 42 USC §9613(b)?

II. Has the state court, in interpreting Section 9621(d)(3) of CERCLA failed to follow the intent of Congress as clearly expressed in that provision?

III. Has the state court, in interpreting Section 9621(d)(3) of CERCLA failed to accord the proper deference to the construction given that statute by the Environmental Protection Agency, the agency charged with the administration of that provision?

LIST OF ALL PARTIES

American Waste and Pollution Control Company*..... Petitioner

Waste Management of North America, Inc..... Parent Corporation of Petitioner, American Waste and Pollution Control Company

Waste Management, Inc.....Parent Corporation of Petitioner's Parent Corporation

Ouachita Parish Police Jury.....Respondent

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* Petitioner has recently effected a Corporate name change. Petitioner's new corporate name is Waste Management of Louisiana, Inc. However, to eliminate possible confusion and promote consistency, petitioner will continue to use its former name, American Waste and Pollution Control Company for purposes of this litigation.

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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

On December 11, 1992, the Supreme Court of the State of Louisiana denied the Petition for Writ of Certiorari and/or Review to the Louisiana Court of Appeal, Second Circuit. The decision is reproduced in the Appendix at A.42. The opinion of the Louisiana Court of Appeal, Second Circuit is reported as *Ouachita Parish Police Jury v. American Waste and Pollution Control Company*, 606 So.2d 1341 (La. App. 2 Cir. 1992), and is reproduced in the Appendix at A.1.

The Ruling and Order of the United States District Court, Western District of Louisiana, remanding the case

to the Fourth Judicial District Court of the State of Louisiana, is reproduced in the Appendix at A.41.

The opinion of the Fourth Judicial District Court of the State of Louisiana is reproduced in the Appendix at A.31.

JURISDICTION

The Second Circuit Court of Appeal of the State of Louisiana entered judgment on October 14, 1992. The Louisiana Supreme Court denied petitioner's request for Writ of Certiorari and/or Review on December 11, 1992.

This court has jurisdiction to review the Court of Appeal judgment under 28 USC §1257. This provision requires that a state court judgment be *"final"* before it may be reviewed by this Court. The state court judgment from which this writ is sought is the State Court of Appeal's affirmance of the issuance of a preliminary injunction. Judgments regarding preliminary injunctions are generally interlocutory and therefore not "final judgments". However, in determining the breadth of its jurisdiction under 28 USC §1257, this court has concluded that when the review of an interlocutory judgment is sought and further state court proceedings may be had, such judgment is nevertheless "final" for purposes of §1257 where the outcome of further proceedings is preordained and, therefore, for all practical purposes, the state litigation is concluded. *Cox Broadcasting Corporation v. Cohn*, 420 U.S. 469, 479, 95 S.Ct. 1029, 1038, 43 L.Ed. 2d 328 (1975); see also, *Organization For a Better Austin v. Keefe*, 402 U.S. 415, 418, 91 S.Ct. 1575, 1577, 29 L.Ed. 2d 1 (1971). Such is the posture of this state litigation.

Petitioner, American Waste and Pollution Control Company ("American Waste"), entered into a contract with respondent, the Ouachita Parish Police Jury (the "Police Jury"), wherein petitioner agreed to accept for disposal at petitioner's landfill waste generated in

Ouachita Parish, Louisiana. This landfill facility is licensed and permitted by the State of Louisiana to receive non-hazardous solid waste as classified by the Resource Conservation and Recovery Act (RCRA). Petitioner also contracted to accept for disposal soil originating from a clean-up in West Dallas, Texas, initiated by the Environmental Protection Agency (EPA) pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The soil was classified by the EPA as non-hazardous waste pursuant to RCRA.

Respondent filed suit in state court to enjoin petitioner's acceptance of this waste, alleging that the disposal of such waste would violate sections 2.01, 2.02, 2.04, and 2.14 of the contract entered into between those parties. The resolution of one of these claims, specifically the alleged violation of Section 2.14 necessarily raises a substantial federal question. Section 2.14 of the contract generally provides that petitioner must comply with all federal laws in the performance of its contractual obligations. The federal question raised is whether 42 USC §9621(d)(3) of CERCLA prohibits the disposal of waste originating from a CERCLA clean-up where such waste is considered non-hazardous waste pursuant to RCRA. The other alleged contractual violations raised purely state law claims.

American Waste removed this action to federal court, suggesting that the matter turned on a substantial question of federal law (i.e., CERCLA) over which the federal district court has exclusive original jurisdiction, and that the two state law claims were clearly frivolous on their face. The respondent moved for remand and argued that the federal question need not be determined by the state court and that the claim could be decided on either or both of the state law theories. The federal court, without written reasons, remanded the case to the state court.

After a hearing in which evidence was introduced, the lower court rejected respondent's state law claims and issued the preliminary injunction *solely* on the basis

of petitioner's alleged violation of Section 2.14 (an interpretation of CERCLA, the federal law).

Thus, as petitioner had suggested to the federal district court on removal, the state law claims were determined to be meritless on their face, and the state court resolved the claim solely on the federal issue. On appeal, the Louisiana Second Circuit, whose decision petitioner now requests this court review, affirmed the lower court's findings. Petitioner's request for writ of certiorari from the Louisiana Supreme Court was subsequently denied. Because the preliminary injunction rests on no disputed questions of fact that might be resolved differently upon further hearing, the issuance of a permanent injunction will be little more than a formality. Further, as will be discussed, the decision of the state court directly conflicts with a decision of the federal district court for the Northern District of Texas in a matter involving this same non-hazardous soil from the EPA clean-up in West Dallas, Texas.

a. Resolution of petitioner's alleged violation of Section 2.14 involved only questions of law and therefore, this claim will not be resolved differently at hearings for a permanent injunction.

The preliminary injunction was granted solely on petitioner's alleged violation of Section 2.14 of the contract. Such a violation allegedly resulted from petitioner having undertaken certain activity which respondent asserted was prohibited by 42 USC §9621(d)(3) of CERCLA. Petitioner admitted to undertaking the activity, but asserted that such activity was not prohibited by 42 USC §9621(d)(3). Therefore, the question of whether petitioner had violated Section 2.14 of the contract turned solely on a question of law, i.e., the interpretation of 42 USC §9621(d)(3). Since this claim upon which the preliminary injunction solely rests, concerned only a question of law, there exists no disputed questions of fact as to this

issue which might be resolved differently upon further hearings. This has now become the law of this case.

b. Respondent's other claims are clearly frivolous and therefore will not be resolved differently upon hearing for permanent injunction.

Respondent's claim for injunction based upon petitioner's alleged violation of Section 2.01, 2.02 and 2.04 of the contract (the state law claims) is clearly frivolous.

First, respondent alleged that Section 2.01 prohibits the taking of waste from outside Ouachita Parish and by doing so,[1] petitioner has violated the contract. The contract plainly states otherwise. Section 2.01 provides in part, as follows:

> "2.01 American Waste agrees, that subject to the issuance to American Waste of all final and non-appealable licenses and permits to design, construct, and operate the sanitary landfill, it will accept and landfill all garbage and bulky waste, rubbish and other refuse delivered by the Parish, residents of the Parish, and public or private agencies domiciled in or operating in Ouachita Parish at the landfill site. Once duly licensed and permitted, American Waste will maintain and operate the landfill site in compliance with the conditions set forth in length in the American Waste Application for a sanitary landfill permit to the Louisiana Department of Natural Resources."

The only contractual obligations assumed by American Waste are *to accept* waste from the Parish and *to operate* the site in compliance with the permit application which is made a part of the contract. Section 2.01 clearly

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[1] It is not disputed that petitioner did accept waste from outside Ouachita Parish.

contains no prohibition against accepting waste from outside Ouachita Parish. Further, the permit mentioned in that section contains no such prohibition. The only language referring to a service area is found at §6.4.3.A of the permit application. That section reads:

> "Even though the proposed site will have the capacity to serve as a multi-parish regional landfill, the initial service area is Ouachita Parish."

This section serves as no limitation on the territorial scope of the landfill, but, rather, reflects the intention to serve areas beyond Ouachita. Indeed, as Dr. James Brent of the Louisiana Department of Environmental Quality (DEQ) testified at trial, the section was later clarified and the permit modified to state that there would be no limitation on the geographical source of waste at the facility.[2] The trial court ruled in favor of petitioner on this issue.

Second, respondent alleged that petitioner has violated Section 2.02 of the contract and for this reason an injunction is warranted. Section 2.02 provides that the Parish of Ouachita shall be kept fully informed of all permit modifications of petitioner. The Police Jury was notified in May of 1988 of the permit modification referred to above.[3] No dispute exists as to this issue. Notice of the modification was not only sent to the Police Jury, but notice was also published in the Monroe "News Star" (the official journal of the Parish), and a copy of the modification was available for public review at the public library.[4] The trial court found that the permit had been modified and ruled in favor of petitioner on this issue.

Finally, respondent alleged that American Waste accepted "hazardous waste" in violation of Section 2.04 of

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[2] Transcript 312-314; Exhibit, American Waste #2-a-h.

[3] Transcript 311; Exhibit, American Waste #2-a-h.

[4] Transcript 313.

the contract, which respondent suggested prohibits the acceptance of such waste. It was not even necessary for the trial court to reach the issue of whether the material accepted falls within the contract's definition of hazardous waste to resolve this claim.

Section 2.04 reads as follows:

> "2.04 American Waste agrees, subject to the issuance to it of all final and non-appealable licenses and permits to design, construct and operate the sanitary landfill, and as soon as practicable thereafter, to accept for disposal all garbage and bulky waste, rubbish and other refuse generated by residents of Ouachita Parish, whether delivered by automobile, trailer, or truck, and all material whatsoever, *except hazardous waste*, collected by any refuse hauler within the Parish of Ouachita. Individual residents of Ouachita Parish shall be permitted to dispose of personal, household waste without charge." (Emphasis added).

The section spells out an obligation to do – i.e., to accept the items listed for disposal. Hazardous waste is listed as an exception to the obligation.

As Corpus Juris Secundum explains:

> "An 'exception', as the term is used with reference to contracts, is the taking of some part of the subject matter of the contract out of it, . . . The ordinary office of an exception . . . is to take out of the contract that which otherwise would have been included in it . . .
>
> Exceptions . . . are construed . . . as a limitation on the language which precedes them, and are presumed to relate to matters which are relevant to the contract and which would be embraced by its terms if not expressly excepted therefrom."

Corpus Juris Secundum, "Contracts", §343. Thus, when this contract uses the phrase "except hazardous waste", it is

merely taking that subject matter out of the general obligation *to accept* material for disposal.

When reading the language of the document that precedes the *exception*, it is clear that it creates a general obligation *to accept* material for disposal. The subject matter of the *exception* otherwise would be included in that obligation *to accept* had it not been excluded. The *exception* then takes its limited subject matter (hazardous waste) *out* of the agreement or obligation *to accept*. It certainly does not create a new and additional agreement or obligation *not to accept*.

To suggest that removing hazardous waste from the obligation *to accept* creates a new and additional obligation *not to accept* strains contractual interpretation to the breaking point and defies the generally prevailing meaning of the terms. Simply stated, American Waste did not agree to accept hazardous waste as defined. Thus, American Waste is not obligated to accept hazardous waste as defined by the contract. But American Waste is not prohibited from doing so, as long as the acceptance is otherwise permitted by its permit.

More importantly, the language of this section clearly limits its application to materials "collected by any refuse hauler within Ouachita Parish." Thus, even if the exception was to be construed as an obligation not to accept hazardous waste, which suggestion is clearly erroneous, it still would only apply to that waste collected within Ouachita Parish and would not apply to the material and activity enjoined in this suit. The trial court agreed with petitioner's reading of this provision of the contract and ruled in favor of petitioner on this issue also.

From the foregoing, it is obvious that the state court's rulings on respondent's claims will not change on the hearing for a permanent injunction, as these claims are clearly frivolous. Furthermore, the ruling as to the interpretation of federal law will be the final ruling of this case. It has been decided by the district court, the Court

of Appeal, and writs have been denied by the Louisiana Supreme Court. The state court judgment is thus "final" for purposes of review by this Court.

c. The decision of the state court conflicts with the decision of a federal district court regarding the same non-hazardous waste from the West Dallas, Texas clean-up.

Finally, and most importantly, the decision of the state court in this action is in direct conflict with the decision of the United States District Court for the Northern District of Texas in the matter entitled, "United States of America v. City of Ennis, Texas, et al.; City of Ennis, Texas, et al. v. Allwaste Environmental Services of Texas, Inc." Appendix at A.135. In that case, the federal court in Texas determined that the very same non-hazardous soil from the EPA clean-up in West Dallas may be transported to and disposed of in a non-hazardous Subtitle D facility in Ellis County, Texas. The EPA on-scene coordinator overseeing the West Dallas, Texas clean-up activity testified at trial in the instant matter that the petitioner was the low bidder for disposal of the non-hazardous soil. Therefore, the end result of this litigation is that the EPA is prohibited from disposing of the soil at a Subtitle D (non-hazardous) facility in Louisiana, but may dispose of the soil in a Subtitle D (non-hazardous) facility in Texas at a higher price. The conflict in the decisions by the Louisiana state court and the federal district court in Texas has only resulted in driving up the cost of disposal of this non-hazardous soil in a non-hazardous facility.

This court has jurisdiction to resolve this conflict.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

42 USC §6941 – §6948 (West 1983 and Supp 1992)
42 USC §9613(b) (West 1983 and Supp 1992)
42 USC §9621 (West 1983 and Supp 1992)

STATEMENT OF THE CASE

I. INTRODUCTION

This application for a writ of certiorari is filed by American Waste and Pollution Control Company ("American Waste" or "petitioner") seeking review of a judgment upholding a preliminary injunction issued in favor of the Ouachita Parish Police Jury ("Police Jury" or "respondent"). This injunction prohibits American Waste from accepting non-hazardous soil for disposal at the Magnolia Sanitary Landfill ("Magnolia"). This soil originated from a clean-up initiated by the Environmental Protection Agency ("EPA") pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") 42 USC §9601 et seq.[5] The soil in question was classified by EPA as non-hazardous pursuant to the Resource Conservation and Recovery Act ("RCRA")[6] and the Magnolia Landfill, a "Subtitle D" or non-hazardous facility under RCRA was deemed by EPA and the Louisiana Department of Environmental Quality (DEQ) as an

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[5] CERCLA, often referred to as the "Superfund" is a Congressional mandate for the clean-up of certain "sites" which due to various factors, including location, type of substance involved, etc., potentially pose some threat to human health or to the environment.

[6] RCRA is a term used to refer to the Resource Conservation and Recovery Act of 1976 which act provides a "cradle to grave" regulatory framework for the disposal of hazardous and non-hazardous wastes.

appropriate facility, duly licensed and permitted, to receive this soil for disposal.

II. FACTS AND PROCEDURAL HISTORY

American Waste and Ouachita Parish entered into a contract[7] wherein American Waste agreed to accept for disposal waste generated in Ouachita Parish at a landfill to be known as the Magnolia facility, owned and operated by American Waste in Ouachita Parish. This facility is licensed and permitted to receive both municipal solid waste and non-hazardous industrial waste. The facility is classified as a RCRA "Subtitle D facility".[8]

Subsequently, American Waste contracted to accept for disposal the RCRA non-hazardous soil generated by an EPA clean-up in a Dallas neighborhood. Both EPA and the Louisiana Department of Environmental Quality determined that this facility could lawfully receive this waste. On February 12, 1992 the Police Jury filed this civil action in the Fourth Judicial District Court for the Parish of Ouachita, State of Louisiana, against American Waste seeking to enjoin the receipt of the Dallas soil. The civil action, as amended and supplemented, was premised upon three alleged breach of contract claims, two of which can be characterized as purely state law claims. However, the third claim necessarily turned on a substantial question of Federal law – CERCLA.

As noted previously, since this latter argument involved a substantial question of federal law regarding

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[7] A.43

[8] A RCRA Subtitle D facility is a facility which is licensed to receive wastes which are non-hazardous according to the RCRA definition of that term. It is uncontroverted that the soil at issue in this matter is RCRA non-hazardous waste material. Subtitle C facilities under the RCRA scheme are facilities authorized to receive hazardous waste.

an alleged violation of CERCLA, American Waste removed this action to federal court. On March 9, 1992, the Police Jury filed a Motion to Remand the matter to state court. In its memorandum in support of remand, the respondent argued that since this petition included two purely state law claims, the federal question involving CERCLA need not necessarily be determined by the state court in order for the plaintiff to prevail. Apparently agreeing with the Police Jury's argument, (since the federal court did not give written reasons for remand), the federal court remanded the case to the state court.

A trial on the preliminary injunction was held April 8-10, 1992, and both parties presented substantial evidence, including expert testimony. On April 21, 1992, judgment was rendered by the trial court enjoining the receipt of the soil. Relative to the two state law claims based upon Sections 2.01 and 2.04 of the contract between American Waste and the Police Jury, the trial court agreed with the position of American Waste and ruled in favor of the petitioner. In rejecting the Police Jury's request for a preliminary injunction on these two grounds, the trial court held as to Section 2.01 that "American Waste was not prohibited from modifying its permits to increase the territorial scope of its landfill."[9] This American Waste had done with due notice provided to the Police Jury. Having the requisite permits and licenses to receive waste from other sources outside the Parish, the agreement between American Waste and the Police Jury did not present any territorial limitation and American Waste was free to contract to receive waste from any source. With regard to the Police Jury's claim relative to Section 2.04 of the contract, the trial court held that the contractual language only provided that "American Waste was not *obligated* to

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[9] A.40

accept this material from *Ouachita Parish*"[10] and that this provision of the contract did not constitute a barrier to the receipt of this material. Further, the trial court found that no irreparable injury would occur by the acceptance and placement of this soil in the Magnolia facility. Although the trial court rejected both state law arguments advanced by the Police Jury, the trial court granted the injunction based upon the alleged violation of Section 2.14 of the agreement premised upon an alleged violation of CERCLA by American Waste. The trial court determined that American Waste *had violated* 42 USC §9621(d)(3) of CERCLA by accepting this soil and that this violation of CERCLA constituted a violation of the "shall comply with all laws" provision contained in Section 2.14 of the contract. The court stated:

> "The Court finds that American Waste is disposing of the removed hazardous substance in violation of CERCLA."[11]

Both American Waste and the Police Jury appealed to the Louisiana Court of Appeals for the Second Circuit. In its Specifications of Error, American Waste suggested to the Appellate Court that:

I. The trial court erred in asserting subject matter jurisdiction over the alleged CERCLA violation; and

II. The trial court erred in finding that CERCLA was violated.

On appeal, the trial court's ruling on each of the three contractual claims was affirmed. While the Appellate Court addressed American Waste's first assignment of error in its opinion, it sidestepped the issue raised by American Waste. The court found:

> "For jurisdictional purposes, however, we need not determine whether the Police Jury's 2.14

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[10] A.40

[11] A.37

> claim raises a substantial question of federal law because the right to relief does not necessarily depend on its resolution. Either of the other two contractual claims, if resolved favorably to the Police Jury, would be sufficient to provide it with the relief sought. Neither of those claims raises an issue of federal law. For this reason, we find that federal jurisdiction does not lie in this case, and the trial court was correct to assert jurisdiction."[12]

Noting that the federal district court had remanded the case to state court, the Appellate Court perceived no error in the state district court's decision to "assert" jurisdiction over the purely federal issue. In deciding American Waste's second assignment of error, the Appellate Court concluded that the phrase "other applicable Federal law" contained in §9621(d)(3) referred to other comprehensive federal schemes and further that the EPA's construction of 42 USC §9621(d)(3) was apparently unreasonable.

The Police Jury had appealed the rejection of its first two claims by the trial court. The Appellate Court deferred to the trial court's finding on both of these claims.[13]

American Waste raised a similar assignment of errors in its application to the Louisiana Supreme Court (See Application for Writ of Certiorari from the Court of Appeal, Second Circuit, State of Louisiana; Assignment of Errors). The Louisiana Supreme Court denied American Waste's application on December 11, 1992. Because the Second Circuit's opinion regarding a res nova issue under CERCLA has far-reaching implications, petitioner now seeks review from this Court.

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[12] A.9

[13] A.26-A.27

REASONS TO GRANT THE WRIT

I. This Court should grant the writ to determine whether a state court entertaining a breach of contract claim which is based upon multiple theories, including an alleged violation of Section 9621(d)(3) of CERCLA, may render a decision based upon that federal theory alone or does the breach of contract claim based upon that theory constitute a "controversy arising under CERCLA" which lies within the exclusive jurisdiction of federal district courts pursuant to 42 USC §9613(b).

In the lower state court, the Police Jury alleged that petitioner had breached the contract between the Police Jury and petitioner, wherein petitioner agreed to accept solid waste generated within the Police Jury's jurisdiction (the parish) for disposal at petitioner's facility, by violating three separate provisions of that contract, Sections 2.14, 2.01 and 2.04. The lower court determined that petitioner had violated Section 9621(d)(3) of CERCLA, thereby violating Section 2.14 of the contract which provided that petitioner was required to conduct operations in compliance with all applicable federal law. The lower court entered a preliminary injunction against petitioner based solely upon that one ground, finding that the other two contractual provisions had not been violated. (Unlike Section 2.14 of the contract, these two provisions raised no federal issues).

The Louisiana Second Circuit Court of Appeal affirmed the lower court's decision. Petitioner asserts, however, that the state courts had no jurisdiction to render a decision on petitioner's alleged violation of CERCLA §9621(d)(3) (i.e., §2.14 of the contract) as this dispute constituted a "controversy arising under CERCLA," and therefore was within the exclusive jurisdiction of federal district courts.

42 USC §9613(b), which vests exclusive jurisdiction in federal courts, states in part that:

> "Except as provided in Subsection (a) and (h) of this section, the United States district courts shall have *exclusive original jurisdiction* over all controversies arising under this Act . . . " (emphasis added). This "Act" being CERCLA.[14]

This general exclusive grant of jurisdiction found in subsection (b) is determinative of two issues. First, federal courts have exclusive original subject matter jurisdiction over *all controversies arising under CERCLA*. Second, state courts are precluded from asserting jurisdiction over *any* controversies which arise under CERCLA. The fact that the Police Jury alleged two other theories which did not

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[14] The sole exceptions to the exclusive jurisdiction over controversies arising under CERCLA are Subsections (a) which deals solely with review of regulations promulgated under the Act and is therefore inapplicable to this litigation, and (h) which provides: "No Federal Court shall have jurisdiction under federal law other than under [diversity claims], or under state law which is applicable or relevant and appropriate under Section 121 . . . to review any challenges to removal or remedial actions selected under Section 104.11, or to review any order issued under Section 106(G) . . . " [Then the statute gives five exceptions to the court's lack of jurisdiction in the above situations]. As with Subsection (a), subsection (h) is also not applicable to the present matter. The present matter does not involve diversity, it is not a review of an order issued under Section 106(h) (this is a contract), nor is the claim raised under state law to review any challenges to removal or remedial actions of EPA. It is vital to observe and note that it is EPA, not American Waste, who formulates and implements CERCLA clean-up actions. A challenge to such an action involves a controversy with EPA, not American Waste! This action allegedly is one solely for an alleged breach of contract. The only activity attributable to American Waste is confined to an agreement to accept for disposal soil which has been the subject of a removal action by the EPA. To contest the clean-up action itself would require a suit against the EPA because it is the EPA, not American Waste, who has selected the clean-up action over which this matter arises.

involve federal issues as a support of its claim that petitioner breached the contract, does not prevent the dispute concerning the violation of Section 2.14 of the contract from being a controversy which arises under CERCLA. The fact that petitioner sought the removal of this case to federal court and that the federal district court remanded the case in no way detracts from this assertion.

Although state law provides the cause of action, (i.e., breach of contract), the *controversy* [violation of §9621(d)(3)] still arises under CERCLA. It is well settled that a "civil action" arises under Federal Law where either: 1) federal law creates the cause of action; or 2) plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law. *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S.1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983). Clearly, the injunctive relief sought by the Police Jury necessarily depends upon the resolution of a substantial question of Federal law. Section 2.14 of the contract provides that, "American Waste shall conduct operations under this contract in compliance with all applicable Federal and State law." The Police Jury requested a preliminary injunction contending that American Waste breached this obligation by violating §9621(d)(3) of CERCLA. §9621(d)(3) provides in part:

> "(d) degree of cleanup . . . (3) In the case of any removal or remedial action involving the transfer of any hazardous substance or pollutant or contaminant offsite, such hazardous substance . . . shall only be transferred to a facility which is operating in compliance with Section 3004 and 3005 of the Solid Waste Disposal Act [42 U.S.C. §6924 and §6925], (or, where applicable, in compliance with the Toxic Substances Control Act [15 U.S.C. §2601 et seq.] or *other applicable Federal Law*) and all applicable state requirements. (emphasis added)

As is discussed more fully in the second assignment of error, American Waste may or may not have violated this section of CERCLA, depending upon the meaning of the phrase "other applicable Federal Law".

Because injunctive relief for a breach of Section 2.14 of the contract necessarily depends upon the construction of §9621(d)(3) of CERCLA, the "controversy" arises under CERCLA for purposes of 42 USC §9613(b) and the exclusive forum for such a controversy is Federal District Court.

Further, Congress intended that *state* causes of action involving CERCLA be exclusively subject to federal court jurisdiction. The exclusivity of the federal courts' jurisdiction was discussed during both the House of Representatives and Senate committee discussions concerning CERCLA §9613(b). Explaining the jurisdictional question to the House Committee, Representative Glickman from Kansas stated:

> "Therefore, any controversy over a response action selected by the President, whether it arises under Federal law *or State law*, may be heard only in Federal court, and only under circumstances provided in this section." (Congressional Record – House at H 9582 October 9, 1986). (emphasis added).

Similarly in the Senate, in a dialogue between Senators Thurmond and Simpson, Senator Thurmond explains the jurisdictional mandate of Section 9613(b):

> "Similarly, the reference to 'Federal court' is simply to recognize existing section 113(b) of CERCLA, which provides that except for review of regulations, Federal district courts have exclusive jurisdiction over all controversies under CERCLA. Therefore, any controversy over a response action selected by the President, *whether it arises under Federal law or State law*, may be heard only in Federal court, and only

> under the circumstances provided in this section." (Congressional Record-Senate at S 14929 October 9, 1986). (emphasis added).

These discussions conclusively declare the Congressional intent behind the jurisdictional provisions of CERCLA. Due to the comprehensive nature of the statute and its relative importance to environmental issues, Congress decided upon a forum for *any* controversy arising under that act, and that forum is exclusively the federal district court. Therefore, by granting to federal courts exclusive jurisdiction, Congress has selected a method to avoid contradictory interpretations concerning CERCLA by the various State Courts.

Because the dispute concerning petitioner's alleged breach of Section 2.14 of the contract constitutes a controversy arising under CERCLA, and as such is subject to the exclusive jurisdiction of federal district court, the state court erred in asserting jurisdiction over and deciding that issue.

The federal district court may have properly remanded this matter to the state court. The "claim" of the Police Jury, although raising a federal issue, could conceivably have been decided on the two purely state law theories (although both were ultimately determined to be meritless). Thus, as the federal district court found that it did not have jurisdiction over the matter as a whole, it could not dismiss the purely federal claim before remanding the matter to the state court. But this certainly does not constitute a determination that the state court has jurisdiction over the purely federal issue.

II. This Court should grant the writ to determine whether the state court in interpreting 42 USC §9621(d)(3) failed to follow the intent of Congress as clearly expressed in the language of that statute, and moreover, whether the state court failed to accord the proper deference to the interpretation given that statute by the agency charged with its administration, both actions being in direct contravention to the jurisprudence of this Court.

Where Congress has directly spoken to the precise question at issue and the intent of Congress is clear, the Court must give effect to such unambiguously expressed intent of Congress. *Chevron, U.S.A., Inc. v. Natural Resources Defense*, 467 U.S. 837, 842, 843, 104 S.Ct. 2778, 2781, 81 L.Ed. 2d 694 (1984). Congress has, in 42 USC §9621(d)(3) directly addressed the issue of whether RCRA non-hazardous wastes which originate from a superfund clean-up may be disposed of in "Subtitle D facilities" and Congress clearly intended to allow such disposal. Because the state court failed to follow the clearly expressed intent of Congress in affirming the injunction against petitioner, its interpretation of 42 USC §9621(d)(3) is erroneous.

Further, where a court finds that Congress has not clearly expressed its intent on the precise issue in question, the court should defer to the reasonable/permissible interpretation given that statute by the agency charged with its administration. (Id. at 2782 and 2783). Therefore, even if the state court determines that 42 USC §9621(d)(3) is ambiguous or silent concerning the precise issue at question, (whether non-hazardous waste from a superfund clean-up must go to a "Subtitle C facility"), the court is required to defer to the reasonable interpretation given that statute by the EPA, which is the federal agency charged with that statute's administration. The EPA has reasonably construed §9621(d)(3) as allowing the disposal of RCRA non-hazardous wastes resulting from the clean-

up of superfund sites in non-hazardous "Subtitle D facilities." The Louisiana State Court, in direct contravention to the jurisprudence of this Court, refused to defer to the EPA's reasonable construction of §9621(d)(3) in rendering its decision, and therefore erred in affirming the lower court's grant of the preliminary injunction.

A. In rendering its decision, the state court has failed to give effect to the unambiguously expressed intent of Congress. (That RCRA non-hazardous wastes resulting from the clean-up of a superfund site may be disposed of in non-hazardous "Subtitle D facilities.")

In viewing the plain language of 42 USC §9621(d)(3) in light of the rules of statutory construction and the legislative history surrounding that provision, it is clear that Congress intended to allow the disposal in "Subtitle D facilities" of RCRA non-hazardous wastes resulting from the clean-up of superfund sites.

The plain meaning of statutory language should be conclusive, except in the rare case in which the literal application of a statute would produce a result demonstrably at odds with the intention of its drafters. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 252, 109 S.Ct. 1026, 1031, 103 L.Ed. 2d 290 (1989). (See also: *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed. 2d 766 (1980)). Under a literal interpretation of the language used in 49 USC §9621(d)(3), hazardous *substances* from a superfund site may be disposed of in RCRA Subtitle D facilities if the wastes containing such substances constitute non-hazardous *wastes* pursuant to RCRA.

42 USC §9621(d)(3) provides that:

> "In the case of any removal or remedial action involving the transfer of any hazardous substance or pollutant or contaminant offsite, such

> hazardous substance or pollutant or contaminant shall only be transferred to a facility which is operating in compliance with section 3004 and 3005 of the Solid Waste Disposal Act [42 U.S.C.A. §6924 and 6925] (or where applicable, in compliance with Toxic Substances Control Act [15 U.S.C.A. §2601 et seq.] or other applicable Federal law) and all applicable State requirements. Such substance or pollutant or contaminant may be transferred to a land disposal facility only if the President determines that both of the following requirements are met:
>
> (A) The unit to which the hazardous substance or pollutant or contaminant is transferred is not releasing any hazardous waste, or constituent thereof, into the groundwater or surface water or soil.
>
> (B) All such releases from other units at the facility are being controlled by a corrective action program approved by the Administrator under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. §6921 et seq.].
>
> The President shall notify the owner or operator of such facility of determinations under this paragraph."

Clearly, this provision provides that waste from a CERCLA clean-up may be transferred to a facility which complies with sections 3004 and 3005 of the Solid Waste Disposal Act *or* to facilities in compliance with the Toxic Substances Control Act *or* facilities in *compliance with other applicable federal law*. Because Subtitle D of RCRA (42 USC §6941 through §6948) which sets out the requirements for the operation of RCRA non-hazardous solid waste landfills, does authorize the disposal of CERCLA hazardous substances in Subtitle D facilities, disposal of CERCLA (also referred to herein as "superfund") hazardous substances at such facilities is permissible under the plain language of §9621(d)(3).

RCRA is a comprehensive federal statute designed for the management of wastes from the point of generator to the point of disposal. The act distinguishes between what (under its criteria) constitutes a hazardous *waste* and what constitutes a solid (non-hazardous) waste. RCRA provides that waste qualifying as non-hazardous may be disposed of in Subtitle D facilities such as the Magnolia Solid Waste Facility selected by EPA as the disposal site for this material.

A material may constitute a hazardous *substance* under CERCLA while qualifying as a non-hazardous *waste* under RCRA. CERCLA is a congressional mandate for the clean-up of certain "sites" which due to various factors, including location, type of substance involved, etc., pose some threat to human health or to the environment. These "sites" and the type of material which is the subject of the CERCLA clean-up of these sites may be *both* RCRA hazardous and RCRA non-hazardous waste, for even non-hazardous waste under the RCRA definition may contain some concentrations of hazardous substances by CERCLA standards. In other words, the RCRA standards relative to disposal (which provide a distinction between non-hazardous and hazardous waste) have nothing to do with the determination that a particular substance should be subject to a CERCLA clean-up. There are different considerations embodied in each Act. In the present situation, for example, the soil from Texas destined for the Magnolia facility contains very low levels of lead. Due to its *location* and potential for human exposure in some West Dallas, Texas neighborhoods, this solid waste was determined to pose a potential threat to human health and, thus, subject to a CERCLA removal action.[15] This same soil, however, is a RCRA non-hazardous waste as defined in the RCRA statute. This soil may,

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[15] Transcript 17-18.

therefore, be disposed of according to its RCRA non-hazardous classification in a permitted, secure disposal facility where no human exposure will occur. It is RCRA which provides the "cradle to grave" law concerning the *disposal* of substances, not CERCLA. Therefore, the determination that a substance is a hazardous substance insofar as CERCLA (removal) is concerned has nothing to do with the RCRA classification insofar as disposal is concerned.

The United States Court of Appeals, Second Circuit, reached such a conclusion in *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192 (2nd Cir. 1992). In that case, local municipalities which had arranged for the disposal of municipal solid waste (non-hazardous waste under RCRA) at Subtitle D facilities asserted that such waste was not included within CERCLA's definition of hazardous substances and therefore the municipalities could not be held liable under CERCLA. The court, in firmly rejecting this assertion, concluded that such waste, even though properly classified under RCRA as non-hazardous, was not exempt from the definition of hazardous substances under CERCLA. The court noted that, "Congress and the EPA have carefully distinguished between *wastes*, to which the Resource and Recovery Act applies, and *substances*, to which CERCLA applies" and, further, "[n]or does including wastes that are not subject to the stringent Subpart C regulations under the Resource and Recovery Act within the definition of hazardous substances under CERCLA create a conflict of interest between the two statutes." Id. at 1202. It is clear from the court's decision in *B.F. Goodrich*, supra, that the designation of a constituent of waste as a hazardous substance under CERCLA does not preclude the disposal of such waste in a RCRA Subtitle D facility.

Finally, the results of this interpretation of §9621(d)(3) are not demonstrably at odds with the intention of the drafters. Congress intended that the clean-up

of one superfund site would not result in another.[16] However, disposal of RCRA non-hazardous material resulting from a CERCLA clean-up at a Subtitle D facility selected by EPA as meeting all the criteria for safe disposal would not increase the chances of this occurring. This was recognized by the federal court in *B.F. Goodrich Co. v. Murtha*, 958 F.2d 1192, 1202-1203 (2nd Cir. 1992) which noted that:

> "Even total compliance with Subpart C regulations will not prevent releases or avoid CERCLA liability. Similarly, the increased likelihood of a release occurring pursuant to Subpart D regulations does not necessarily suggest a proportional increased likelihood that a response will be warranted under CERCLA, *because of the small concentrations of hazardous substances found in wastes regulated under that Subpart*." (emphasis added).

Therefore, the literal interpretation of §9621(d)(3) of CERCLA would not be at odds with the intention of the drafters.

Since Subtitle D of RCRA is a federal law which provides for the disposal of CERCLA hazardous substances (which may also constitute RCRA non-hazardous

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[16] This may be gleaned from a portion of a conference committee report which states, "The response and remedial actions taken by EPA under this program must be designed and carefully monitored to ensure that the proposed solutions to today's problems do not create new, perhaps more serious problems tomorrow. This is an especially important responsibility when the waste material is removed to a land disposal facility that, if improperly operated in violation of RCRA requirements, could contaminate groundwater or surface water and thereby present threats to human health and the environment." H. R. Rep. No. 99-962, 99th Congress, 2nd Sess. 248 (1985) *reprinted in* 1986 U.S.C.C.A.N. 2835, 3341.

waste) in Subtitle D facilities, under a literal interpretation of 42 USC §9621(d)(3), CERCLA hazardous substances may be disposed of in Subtitle D facilities.

Under another basic maxim of statutory construction, laws upon the same subject matter should be construed in reference to one another and construed so that possible conflicts between them are avoided. (*In Pari Materia*). As noted above, both §9621(d)(3) and RCRA may apply to the same "material", RCRA regulating its disposal and §9621(d)(3) regulating its removal from a superfund site. To construe §9621(d)(3) as somehow mandating that land disposal of RCRA non-hazardous waste from a superfund clean-up must take place in a "Subtitle C facility" would bring that provision into direct conflict with RCRA, which would allow that same material, if *not* from a superfund clean-up and *not* a RCRA hazardous waste, to be disposed of in a "Subtitle D facility." There is no rationale which could support such a result. To avoid this unnecessary conflict, the phrase "other applicable Federal law" contained in §9621(d)(3) must be construed as including other applicable provisions of RCRA in addition to Subtitle C.

Furthermore, to construe §9621(d)(3) as prohibiting the disposal of RCRA non-hazardous wastes in Subtitle D facilities when such waste originates from a superfund clean-up would lead to unreasonable consequences. For example, RCRA (which governs the disposal of solid and hazardous waste) provides a testing procedure to determine which substances are to be received by a particular class of disposal facility. Industrial waste generators, needing disposal facilities for various wastes, test their substances to determine to which class of facility their particular wastes can lawfully be transferred for disposal, i.e., to Subtitle C facilities if the waste is hazardous, or Subtitle D facilities if the waste is non-hazardous. But here, where both the EPA and the LDEQ state unequivocally that the waste is RCRA non-hazardous waste, the

trial court found that the EPA may only dispose of this non-hazardous material at a Subtitle C facility because it resulted from a CERCLA clean-up and removal action.

Industry, municipalities, and the public are not so restricted and are allowed to dispose of their waste according to the waste's RCRA classification. But, under the trial court's interpretation, the EPA when responding under CERCLA is so restricted. Logically this cannot be the intent of Congress in promulgating §9621(d)(3).

From the foregoing, it is clear that Congress directly addressed the issue of whether RCRA non-hazardous waste resulting from a superfund clean-up may be disposed of in a Subtitle D facility such as Magnolia. Congress clearly intended to allow such disposal under 42 USC §9621(d)(3). By affirming the lower court's decision that 42 USC §9621(d)(3) prohibits such disposal, the Louisiana Second Circuit Court of Appeal failed to follow the clear intent of Congress and was in error for doing so.

B. In affirming the lower court's interpretation of 42 USC §9621(d)(3) the state court failed to accord proper deference to the EPA's construction of that provision.

Where a statute is ambiguous concerning a specific issue, courts must defer to the reasonable interpretation given that statute by an agency charged with its administration. *Chevron, U.S.A., Inc. v. Natural Resources Defense,* 467 U.S. 837, 843, 104 S.Ct. 2778, 2781-2782 (1984); see also: *U.S. v. Alaska,* ___ U.S. ___, 112 S.Ct. 1606, 1610, 118 L.Ed.2d 222 (1992). The EPA has construed 42 USC §9621(d)(3) as allowing the disposal of RCRA non-hazardous wastes from superfund sites in Subtitle D facilities. Therefore, while petitioner strongly asserts that Congress, through 42 USC §9621(d)(3) has clearly expressed its intention to permit the disposal of RCRA non-hazardous wastes from superfund sites in Subtitle D facilities, even if §9621(d)(3) were ambiguous on that

issue, the state court would be bound to follow EPA's reasonable interpretation of that provision.

If indeed §9621(d)(3) is determined to be ambiguous on this issue, then the state court's refusal to defer to the interpretation given that statute by the EPA is in conflict with previous decisions of this Court.

The EPA is the agency charged with the administration of CERCLA including §9621(d)(3). CERCLA §9621 vests the President with the authority to select and execute an appropriate remedial action plan for the clean-up of a superfund site. However, 42 USC §9615 authorizes the President to delegate such authority to others. Pursuant to this provision, the President has delegated and assigned his duties and power under CERCLA §9621 to the Administrator of the EPA.[17]

The EPA has interpreted §9621(d)(3) as allowing waste from a superfund clean-up to be disposed of in "Subtitle D facilities" such as Magnolia, as long as such waste is classified as "non-hazardous waste" under RCRA.[18]

The EPA's construction of §9621(d)(3) constitutes a permissible construction of that statute. EPA's interpretation conforms to the literal meaning of the language used by Congress in drafting §9621(d)(3) and is therefore permissible under the rules of statutory construction.

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[17] Ex. or No. 12580 of Jan. 23, 1987, 52 Fed. Reg. 2923 Section 2.(g); see also: *Eagle-Picher Industries v. United States E.P.A.*, 759 F.2d 905, 920 (1985) where the court stated, " . . . we see that the EPA has been entrusted with the administration of CERCLA."

[18] EPA's long-standing interpretation of CERCLA §9621(d)(3) is reflected in its "off-site policy", OSWER Directive 9355.4-02 (November 13, 1987); see also: Testimony of Mr. Warren Zehner, on scene coordinator of EPA, concerning this "off-site policy." (A.76, A.94)

Further, the EPA, in construing §9621(d)(3), has made a reasonable policy choice within the framework of CERCLA. In selecting a remedial action, the EPA must choose one that is protective of human health and the environment, and that is cost effective.[19]

By allowing RCRA non-hazardous wastes from a superfund site clean-up to be disposed of in "Subtitle D facilities," the EPA is acting in a manner that is protective of both human health and the environment, for, after all, Congress has mandated that sanitary landfills ("Subtitle D facilities") pose no reasonable probability of adverse effects on health or the environment when solid wastes (RCRA non-hazardous wastes) are disposed of at such facilities.[20] Further, since the disposal of such materials in Subtitle D facilities is less costly than their disposal in Subtitle C facilities, the EPA's interpretation of §9621(d)(3) complies with Congress' concern over the cost effectiveness of remedial action programs.

Even if §9621(d)(3) is ambiguous on the issue of whether RCRA non-hazardous wastes from a superfund clean-up could be disposed of in "Subtitle D facilities," the state court should have deferred to the EPA's reasonable interpretation of that statute. In failing to do so, the state court clearly disregarded the law as set forth by this court in *Chevron, U.S.A., Inc. v. Natural Resources Defense*, supra.

CONCLUSION

Congress has vested federal courts with original exclusive jurisdiction over controversies arising under CERCLA. Yet, the Louisiana state courts have taken cognizance of such a controversy and in the process have rendered a construction of §9621(d)(3) of CERCLA which

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[19] 42 USC §9621(b)(1).

[20] 42 USC §6944(a).

is not only at odds with the clearly expressed *intent* of Congress, but also with the construction given that statute by the EPA. This has led to the hampering of a CERCLA clean-up initiated by the EPA under CERCLA. We urge that this Honorable Court act now in order to lift this unlawful injunction.

Respectfully submitted,

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OUACHITA PARISH POLICE JURY,
Plaintiff-Appellee,

v.

AMERICAN WASTE AND POLLUTION CONTROL COMPANY, Defendant-Appellant.

No. 24,415-CA.

Court of Appeal of Louisiana,
Second Circuit.

Oct. 14, 1992.

C. Lynn Tubb, Parish Atty., for plaintiff-appellee/appellant, Ouachita Parish Police Jury.

Phelps Dunbar by H. Alston Johnson, III, Steven J. Levine, J. Randall Trahan, Schwab & Walter by Gerald L. Walter, Jr., James C. Percy, Brent B. Boxill, Baton Rouge, Hudson, Potts & Bernstein by Ben R. Hanchey, William McNew, Monroe, for defendant-appellant/appellee, American Waste & Pollution Control Co.

Before NORRIS, LINDSAY and STEWART, JJ.

NORRIS, Judge.

The Ouachita Parish Police Jury sued American Waste and Pollution Control Co., d/b/a Waste Management ("American Waste"), seeking to enjoin American Waste from depositing lead-tainted dirt from a Dallas Superfund site into Magnolia Landfill, a solid waste facility operated by American Waste in Ouachita Parish. The police jury urged that the proposed dumping was a violation of American Waste's contract with the police jury to provide sanitary landfill services to the parish. The trial court entered a temporary restraining order and, after a four-day hearing, granted a preliminary injunction as

prayed for. American Waste now appeals the grant of preliminary injunction on several grounds. The police jury also appeals certain findings of fact in the trial court's opinion. For the reasons expressed, we affirm.

Factual background

In 1983 Ouachita Parish Police Jury solicited bids to build a large, modern sanitary landfill for the parish. American Waste submitted the low bid and entered a contract with the Police Jury on May 1, 1984. The relevant provisions of the contract are set forth below, but it generally obligated American Waste to accept all forms of waste generated by residents of Ouachita Parish, and to comply with all policies and regulations of federal and state agencies having jurisdiction over sanitary landfills.

American Waste obtained the state permits to build a landfill for nonhazardous sanitary and industrial waste. Under federal law, Magnolia is considered a Subchapter "D" facility, which may receive solid (nonhazardous) waste. 42 U.S.C. § 6941 et seq., Resource Conservation and Recovery Act ("RCRA"). Facilities for the receipt of hazardous waste (called Subchapter "C" facilities) are subject to stricter regulation. 42 U.S.C. § 6921 et seq. (also in "RCRA").

American Waste began construction of Magnolia Landfill on the "Sullivan Tract," south of I-20 near La. Hwy. 594. The location is adjacent to the Russell Sage Wildlife Area and three miles west of Bayou Lafourche. Magnolia began receiving waste in early 1986. The landfill is divided into "cells," large excavations into which waste is dumped. Each day the waste is spread and

covered with dirt or foam. Even with daily covering, rainwater seeps through the waste, creating a fluid called "leachate" that contains a high concentration of the substances in the waste. When the cell is full, it is sealed.

In June 1988, American Waste obtained a permit modification from the Louisiana Department of Environmental Quality ("DEQ") to allow Magnolia Landfill to accept waste from all areas regardless of point of origin. By late 1991, American Waste was building Cells 8 and 9 (the "as built" map of Cell 8 is dated March 1992). The bottom of these cells is a liner made of at least three feet of recompacted clay topped with at least one foot of sand. There is no synthetic material in the liner.

Meanwhile the U.S. Environmental Protection Agency ("EPA") was cleaning up a superfund site in West Dallas. The site is near an old battery smelting plant and required the removal of 40,000 cubic yards of soil contaminated with lead, arsenic and other toxic metals. Under the Superfund statute, this soil is considered to contain hazardous substances. 42 U.S.C. § 9601 et seq., Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"). The lead concentration in the Dallas dirt is 1,407 ppm, yielding a total of 180,000 lbs. of lead in the soil to be removed. EPA's removal contractor, Reidel-Peterson Environmental Services, let out bids for disposal of the soil and ultimately American Waste's bid was accepted.

In early February 1992 Reidel began shipping the soil by convoy of covered trucks to Magnolia Landfill. On

February 10 the Police Jury formally requested that deliveries be stopped, citing provisions of the contract. American Waste refused, and this suit was filed on February 12.

The American Waste/Police Jury Contract

The general purpose of the contract is set out in ¶ 2.01, which provides that American Waste will

> accept and landfill all garbage and bulky waste, rubbish and other refuse delivered by the Parish, residents of the Parish, and public or private agencies domiciled in or operating in Ouachita Parish at the landfill site. Once duly licensed and permitted, American Waste will maintain and operate the landfill in compliance with the conditions set forth in length in the American Waste application for a sanitary landfill permit to the Louisiana Department of Natural Resources [now DEQ]. * * *

With respect to permits, ¶ 2.02 states, "In the event that American Waste determines that permit modifications are needed, American Waste shall on its own and at its costs, secure such modification. The Parish of Ouachita shall be kept fully informed of all such permit modifications."

A reference to hazardous waste appears in ¶ 2.04:

> American Waste agrees * * * to accept for disposal all garbage and bulky waste, rubbish and other refuse generated by the residents of Ouachita Parish, whether delivered by automobile, trailer, or truck, and all material whatsoever, *except hazardous waste*, collected by any refuse hauler within the Parish of Ouachita. (emphasis added)

The contract defines hazardous waste in ¶ 1.05 by reference to designations by the EPA and Louisiana Department of Natural Resources (now DEQ). A hazardous waste is "any chemical, compound, mixture, substance, or article" designated by EPA or DEQ "to be a hazardous or a toxic substance as terms defined by or pursuant to Federal, State or Parish rules, laws, or regulations."

American Waste is further obligated, in ¶ 2.14, to "conduct operations under this contract in compliance with all applicable Federal and State Law."

Under ¶ 15.01, the failure to perform any part of the contract by American Waste shall be considered a breach of contract. Should American Waste fail to perform or cure any defaults within 10 days of written notice, then the parties have the option to terminate the contract. Under ¶ 15.02, "The remedy of the contracting parties in the event of default is the termination of the contract, an action on the bond and an action against the company."

Procedural history

The Police Jury's verified petition to enjoin violation of contract, filed February 12, 1992, asserts two claims of breach. The first is the territorial claim: ¶ 2.01 specifies Ouachita Parish as the initial service area and ¶ 2.02 requires American Waste to notify the Police Jury of any permit modifications; however, American Waste never notified the Police Jury of a modification and has accepted material from the state of Texas. The second is the hazardous waste claim: ¶ 2.04 prohibits American Waste from accepting hazardous waste, but the Dallas

dirt is a hazardous substance under CERCLA, and thus a hazardous waste under ¶ 1.05's definition. The Police Jury alleged that mere termination of the contract would not prevent irreparable harm in the form of contaminated water supply and a threat to public health; thus it prayed for injunctive relief to restrain American Waste from accepting, placing or allowing to be placed lead-tainted soil in Magnolia Landfill. On the basis of this petition, the trial court issued a TRO.

By its first amending petition, the Police Jury added a third claim of breach of contract. Under ¶ 2.14, American Waste must comply with all applicable Federal and State law; however, a provision of CERCLA, 42 U.S.C. § 9621(d)(3), states that in the case of any Superfund removal or remedial action involving the transfer of any hazardous substance offsite, such hazardous substance shall only be transferred to a facility which is operating in compliance with special provisions of RCRA, 42 U.S.C. §§ 6924 and 6925; and before the transfer may occur, the President (acting through the EPA) must determine that the unit to which the hazardous substance is transferred is not releasing any hazardous waste, and all such releases from other units at the facility are being controlled by a corrective action approved by the EPA administrator under Subchapter C. In short, American Waste does not have a hazardous waste disposal (Subchapter C) permit for Magnolia Landfill, so accepting the Dallas dirt there is a violation of CERCLA and a breach of the contract.

On March 2, American Waste filed a notice of removal of the action to United States District Court. Construing the amended petition as one "arising under" CERCLA,

American Waste asserted the federal court had exclusive original jurisdiction under a special provision of CERCLA, 42 U.S.C. § 9613(b). The Police Jury filed a motion to remand the case to state court, and supplied an extensive brief. Ultimately the federal court remanded the case to state court for lack of subject matter jurisdiction. Fed.R.Civ.Pro. 12(b)(1).

Back in state court the matter proceeded to a hearing for preliminary injunction on April 2, 3, 8 and 9, 1992; post trial briefs were filed. The court issued reasons for judgment on April 21.

Briefly stated, the court cited American Waste's duty to comply with all applicable federal and state laws under ¶ 2.14. The court carefully analyzed the provision of CERCLA dealing with the removal of hazardous substances from Superfund sites, 42 U.S.C. § 9621(d)(3), and found that it mandates that the substances be transferred to Subchapter "C" landfills. Since Magnolia Landfill is admittedly a Subchapter "D" facility, CERCLA does not permit it to receive such substances. The court considered and rejected American Waste's arguments to the contrary, including the contention that an EPA official, Mr. Warren Zehner, had approved the procedure; Mr. Zehner's approval notwithstanding, the disposal plan was contrary to CERCLA. The court then found, by referring to ¶ 15.01, that American Waste's conduct was a breach of contract, thus permitting the Police Jury to bring "an action against the company." The claim for injunction was proper, and no showing of irreparable injury was needed, as the Police Jury was seeking to enjoin American Waste from a course of action forbidden by law. *Miller v. Knorr*, 553 So.2d 1043 (La.App. 4th Cir. 1989), and citations therein.

The court therefore granted the preliminary injunction. The court further commented that on the showing thus far made, the Police Jury had not prevailed on its other contractual claims.

Judgment granting the preliminary injunction was signed on April 29, 1992. Both sides have appealed. The matter was expedited by order of this court on July 9, 1992.

Discussion: Subject matter jurisdiction

By its first assignment American Waste urges the trial court erred in asserting jurisdiction over this action. The argument is based on a provision of CERCLA, 42 U.S.C. § 9613(b), which grants to federal district courts the "exclusive original jurisdiction over all controversies arising under" CERCLA, without regard to the citizenship of the parties or the amount in controversy. Without jurisdiction, American Waste contends, the state district court cannot grant relief of any kind over a CERCLA claim.

Whether a case "arises under" federal law is determined by reference to the plaintiff's well-pleaded complaint. A federal court does not have jurisdiction over a case in which the complaint asserts only a state law cause of action. The Police Jury's petition, as amended, sets forth three separate claims on which injunctive relief could be granted, each stemming from the alleged violation of a specific contractual provision. As an initial proposition, the claim is surely based on state law and properly within the trial court's jurisdiction.

In some instances, however, even though state law creates the plaintiff's cause of action, the federal court may have jurisdiction, if the plaintiff's right to relief under state law is *necessarily dependent* upon the resolution of a "substantial question of federal law." *Franchise Tax Bd. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983), and citations therein; see also *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988). In the instant case the only claim that might arguably raise a substantial question of federal law is the third claim, alleging a breach of ¶ 2.14 of the contract. This provision obligated American Waste to comply with all applicable federal laws, including CERCLA.

For jurisdictional purposes, however, we need not determine whether the Police Jury's ¶ 2.14 claim raises a substantial question of federal law because the right to relief does not necessarily depend on its resolution. Either of the other two contractual claims, if resolved favorably to the Police Jury, would be sufficient to provide it with the relief sought. Neither of those claims raises an issue of federal law. For this reason we find that federal jurisdiction does not lie in this case, and the trial court was correct to assert jurisdiction.

We note parenthetically that American Waste removed this case to federal district court, but that court declined to accept jurisdiction. We are no more inclined to second-guess the federal judge's reasoning than we are empowered to reverse his decision. We perceive no error in our state court's decision to *accept* jurisdiction.

American Waste further asserts that after the federal court's remand and the state district court's ruling on the preliminary injunction, the Police Jury's only remaining claim for relief is the one based on ¶ 2.14 of the contract and on CERCLA. With the genuine state claims winnowed out, the argument goes, jurisdiction in the state court is now improper.

We disagree. A preliminary injunction is a procedural device interlocutory in nature and designed to preserve the existing status pending a trial of the issues on the merits of the case. La.C.C.P. art. 3601; *GMAC v. Daniels,* 377 So.2d 346 (La.1979); *Equitable Petroleum v. Central Transmission Inc.,* 431 So.2d 1084 (La.App.2d Cir.1983). The principal demand is determined on its merits only after a full trial under ordinary process, even though the summary proceedings for the preliminary injunction may touch upon or tentatively decide issues on the merits. *Smith v. West Virginia Oil & Gas Co.,* 373 So.2d 488 (La.1979). The trial court's comment that it "disagreed" with the Police Jury's other contract claims is, strictly speaking, a holding that the Police Jury failed to make a prima facie case on those claims at the preliminary injunction hearing. It is not a dismissal of those claims, and certainly not grounds to transform the case from one of state to federal jurisdiction.

American Waste's first assignment lacks merit.

CERCLA violation

By its second assignment American Waste urges the trial court erred in finding a CERCLA violation. It argues that the trial court's interpretation of the applicable

CERCLA provision, 42 U.S.C. § 9621(d)(3), is plainly wrong, and that provisions of RCRA actually govern the disposal of substances, 42 U.S.C. §§ 6924, 6925. Under the proper analysis, American Waste argues, the Dallas dirt may be properly deposited in Magnolia Landfill. American Waste adds that the EPA, through the testimony of Mr. Zehner, has construed the statutes in a manner favorable to American Waste's plan, and the agency construction is entitled to great deference.

Broadly stated, CERCLA is a statutory scheme that provides a comprehensive response to the problem of hazardous substance release. *Wickland Oil Terminals v. Asarco Inc.*, 792 F.2d 887 (9th Cir.1986). It provides for cleanup, compensation and liability where there is a threat from hazardous substances. L. Barr, "CERCLA Made Simple," 45 Bus.Law. 923, 925 (1990). The final disposition of hazardous substances which have been removed from cleanup sites is addressed in 42 U.S.C. § 9621(d)(3), which provides as follows:

> **(d) Degree of cleanup.**
>
> * * *
>
> (3) In the case of any removal or remedial action involving the transfer of any hazardous substance or pollutant or contaminant offsite, such hazardous substance * * * shall only be transferred to a facility which is *operating in compliance with section 3004 and 3005 of the Solid Waste Disposal Act* [42 U.S.C. §§ 6924 and 6925] (or, where applicable, in compliance with the Toxic Substances Control Act [15 U.S.C. § 2601 et seq.] *or other applicable Federal law*) and all

> applicable State requirements. Such substance * * * may be transferred to a land disposal facility only if the President determines that both of the following requirements are met:
>
> (A) The unit to which the hazardous substance * * * is transferred is not releasing any hazardous waste, or constituent thereof, into the ground-water or surface water or soil.
>
> (B) All such releases from other units at the facility are being controlled by a corrective action program approved by the Administrator under subtitle C of the Solid Waste Disposal Act [42 U.S.C. § 6921 et seq.].
>
> The President shall notify the owner or operator of such facility of determinations under this paragraph. (emphasis added)

This section refers explicitly to two provisions of RCRA, 42 U.S.C. §§ 6924 and 6925, which are part of RCRA's Subchapter "C" for the disposal of hazardous wastes. In other words, CERCLA plainly states that if hazardous substances removed from Superfund sites are to be stored offsite, the offsite storage facility must qualify under RCRA Subchapter "C" for hazardous wastes. Magnolia Landfill is, by every witness's admission, only a Subchapter "D" facility for solid waste. Thus the provisions of CERCLA (and of RCRA, read *in pari materia*), do not permit the storage of the lead-contaminated Dallas dirt at Magnolia Landfill.

American Waste advances several arguments intended to show that this conclusion is wrong. First it cites the reference in 42 U.S.C. § 9621(d)(3) to "other applicable Federal law." By this argument, hazardous

substances extracted from a Superfund site are specifically directed to landfills governed by Subchapter "C," but they may be directed to landfills governed by the less stringent Subchapter "D," which is another applicable Federal law. We disagree. When Congress enunciated the offsite disposition of hazardous substances, it specified RCRA Subchapter "C" facilities. To read the statute as allowing Subchapter "D" facilities as well would subvert Congress's clearly stated intent. The example given in the statute is the Toxic Substances Control Act, a completely different comprehensive federal scheme located elsewhere in the code. We think "other applicable Federal law" refers to other comprehensive federal schemes, not to other sections of RCRA. If Congress had intended that CERCLA hazardous substances could go to RCRA solid waste facilities, it would have so stated. It did not, and we reject American Waste's argument.

Next American Waste asserts that the uncontroverted testimony of Mr. Warren Zehner, the EPA's on-scene coordinator, expresses the agency construction of these statutes and is entitled to great deference. Indeed, courts must defer to the EPA's reasonable construction of CERCLA, absent a clearly expressed contrary Congressional purpose. *B.F.Goodrich Co. v. Murtha*, 958 F.2d 1192 (2d Cir.1992), citing *Chevron USA Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). However, this deference is granted only when the EPA's interpretation is *reasonable* under the statute and there are not "compelling indications that it is wrong." *B.F. Goodrich Co. v. Murtha*, supra at 1205; *Weeks v. Quinlan*, 838 F.2d 41 (2dCir.1988). For the reasons already outlined, we find that the applicable statutes do

not permit the conclusion that the Dallas dirt may be stored in Magnolia Landfill, a Subchapter "D" facility. Thus the trial court was not wrong to reject Mr. Zehner's interpretation to that effect.

American Waste finally urges that even though the Dallas dirt is considered a "hazardous substance" for purposes of CERCLA, it is *not* considered "hazardous waste" for purposes of RCRA, and may therefore be stored in a RCRA Subchapter "D" facility. We do not dispute that under the statutory definitions, this is true; the concept of "hazardous substance" under CERCLA, 42 U.S.C. §§ 9601(14), 9602, and of "hazardous waste" under RCRA, 42 U.S.C. § 6903(5), are not equivalent.[1] Several witnesses at the hearing on the preliminary injunction acknowledged this, including the Police Jury's witness, Dr. Richard Parent. Under the circumstances of this case, however, the classification is not the only factor. The applicable provision of CERCLA, 42 U.S.C. § 9621(d)(3), directs that hazardous substances removed from Superfund cleanup sites must be disposed of in Subchapter "C" facilities if they are taken off-site. This is so regardless of whether the substance qualifies as RCRA "hazardous waste."

The trial court's analysis of the contract and the federal statutes, and its dismissal of American Waste's

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[1] We accept the admonition of counsel for the Police Jury to avoid making a word mean just what we choose it to mean, "neither more nor less." The attribution, however, is to Humpty Dumpty (not the Red Queen) in Lewis Carroll's *Through the Looking Glass* (not *Alice in Wonderland*). See M. Gardner, *The Annotated Alice* (New York; New American Library, c1960), 269.

objections, is not plainly wrong. This assignment lacks merit.

The liable party

By its third assignment American Waste urges that if there was a CERCLA violation, the trial court erred in finding that American Waste was the violator. The argument is divided into two headings.

First, American Waste claims that 42 U.S.C. § 9621(d)(3) prohibits only the *transfer* of hazardous substances to a Subchapter "D" facility; American Waste is without fault because it is only receiving, not transferring, the Dallas dirt. This facile argument is premised on an incorrect reading of § 9621(d)(3). True, the statute uses the word *transfer* to describe the proscription, but CERCLA does not define *transfer*. Perhaps American Waste wishes Congress had said "transport," which is defined in CERCLA, 42 U.S.C. § 9601(26), as the "movement of a hazardous substance by any mode, including pipeline[.]" A plain reading of the entirety of § 9621(d)(3) shows that it addresses not just the "transport" or movement of hazardous substances but their *transfer* "in the case of any removal or remedial action[.]" "Remedial action" expressly includes storage and disposition of the substances. 42 U.S.C. § 9601(24). *Transfer*, as used in this statute, obviously encompasses American Waste's conduct in agreeing to accept and dispose of the transported material.

Second, American Waste claims that the statute imposes obligations on the EPA, and not upon receiving facilities such as American Waste. If the Police Jury's suit

were based solely on CERCLA, this argument might have merit. However, the claim arises from ¶ 2.14 of the contract, which obligates American Waste to "conduct operations under this contract in compliance with all applicable Federal and State Law." The purpose of this provision is apparently to make American Waste adhere to CERCLA's scheme, which the EPA by statute is bound to enforce. The contract thus binds American Waste to § 9621's order that hazardous waste "shall only be transferred to a facility which is operating in compliance with section 3004 and 3005 [Subchapter C] * * * ." To find that § 9621 does not so obligate American Waste would render ¶ 2.14 meaningless. La.C.C. art. 2049. The trial court found that American Waste's part in the overall scheme to dispose of a hazardous substance, lead-tainted dirt, in this solid waste facility, Magnolia Landfill, is contrary to the letter and spirit of CERCLA. By engaging in this conduct, American Waste breached its obligation to comply with CERCLA, an applicable Federal Law. In effect, CERCLA is a gauge of American Waste's performance, and the trial court was not plainly wrong in finding that American Waste breached the contract.

This assignment lacks merit.

Exclusive contractual remedy

By its fourth assignment American Waste urges the trial court erred in granting a remedy not contemplated by the parties to the contract. In the event of a breach of contract the Police Jury has, under ¶ 15.01, the *option* to terminate the contract; and ¶ 15.02 states, more extensively, "The remedy of the contracting parties in the event

of a default is the termination of the contract, an action on the bond and an action against the company." This limitation, American Waste argues, excludes the option of injunctive relief against it.

Contracts have the effect of law for the parties. La.C.C. art, 1983; *Leenerts Farms Inc. v. Rogers,* 421 So.2d 216 (La. 1982). The words of a contract are given their generally prevailing meaning. La.C.C. art. 2047; *Franks Petroleum Inc. v. Mayo,* 438 So.2d 696 (La.App. 2d Cir.), writ denied 443 So.2d 595 (1983).

Injunctive relief is not available to enjoin the breach of an agreement where the parties have agreed to liquidated damages in case of a breach. *Beneficial Fin. Co. of Monroe v. Aldridge,* 200 So.2d 681 (La.App. 2d Cir.), writ ref'd 251 La. 220, 203 So.2d 556 (1967), and citations therein; *Deer Slayers v. Louisiana Motel & Inv. Corp.,* 434 So.2d 1183 (La.App. 1st Cir), writ denied 440 So.2d 151 (1983). In the absence of a contract, Louisiana law acknowledges injunctive relief as a remedy to stop the dumping of chemical wastes into a landfill. La.C.C.P. art. 3601; *Salter v. B.W.S. Corp.,* 290 So.2d 821 (La.1974).

The instant contract does not specifically include or exclude injunction as a remedy for breach. Rather, ¶ 15.01 lists termination as an option, and ¶ 15.02 authorizes "an action against the company," The initial answer to American Waste's argument, therefore, is that the instant claim for injunctive relief is indeed an action against the company and is not expressly prohibited by the contract.

American Waste further argues that the passages must be read together and interpreted as granting the Police Jury the authority to (1) dissolve the contract or (2)

sue on the bond with an action against American Waste for damages. The trial court aptly noted that the contract does not contain a liquidated damages clause. If American Waste can interpret from these provisions a right to sue for damages, then the Police Jury and the trial court can surely construe them to authorize a suit for injunction. As noted, this remedy is not prohibited.

Moreover, if the contract had contained a liquidated damages clause, this would have implicitly eliminated the option of injunctive relief. *Beneficial Fin. v. Aldridge*, supra. Given the provisions of ¶ 15.01 and 15.02, and the possibility of injunction in this type of case, *Salter v. B.W.S. Corp.*, supra, the trial court was not plainly wrong to find that injunction is an available remedy on this contract.

This assignment lacks merit.

Requisite showing for preliminary injunction

By its fifth assignment American Waste urges that even if the contract allows a suit for injunctive relief, the trial court erred in granting the preliminary injunction without a showing of irreparable injury or that the plaintiff has no other remedy at law. American Waste cites the trial court's remark, in the written opinion, that the Police Jury did not meet its burden of proving irreparable injury. R.p. 474.

An injunction "shall issue in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law[.]" La.C.C.P. art. 3601. Irreparable injury usually means loss

which cannot be adequately compensated in money damages or measured by pecuniary standard. *Terrebonne Parish Police Jury v. Matherne,* 405 So.2d 314 (La.1981), cert. denied 456 U.S. 972, 102 S.Ct. 2234, 72 L.Ed.2d 845 (1982). However, irreparable injury is a requisite only when the conduct sought to be enjoined is lawful. The jurisprudence firmly establishes that when the conduct is illegal, a showing of irreparable injury is not required. *Miller v. Knorr,* supra; *Hays v. City of Baton Rouge,* 421 So.2d 347 (La.App. 1st Cir.), writ denied 423 So.2d 1166 (1982); *Smith v. West Virginia Oil & Gas Co.,* 365 So.2d 269 (La.App. 2d Cir.1978), rev'd. on other grounds 373 So.2d 488 (1979); *McElveen v. Calcasieu Parish Police Jury,* 443 So.2d 666 (La.App. 3d Cir.1983), writ denied 444 So.2d 1222 (1984); *Louisiana Associated Gen'l Contractors v. Calcasieu Parish Police Jury,* 572 So.2d 623 (La.App. 3d Cir.1990), aff'd. 586 So.2d 1354 (1991).

American Waste correctly argues that the trial court did not find the Police Jury made a Prima Facie showing of irreparable injury. However, the court also found that the Police Jury was seeking to enjoin American Waste from engaging in conduct prohibited by law. In this situation the plaintiff is not required to show irreparable harm. *Miller v. Knorr,* supra; *Smith v. West Virginia Oil & Gas Co.,* supra, and citations therein. On appeal American Waste does not dispute this principle; instead it argues that this exception to the irreparable harm requirement applies only when there is a "clear" (as opposed to an "arguable") violation of law. In support it cites *New Orleans Public Serv. Inc. v. City Council,* 539 So.2d 891 (La.App. 4th Cir.1989), *Hobbs v. Gorman,* 595 So.2d 1264 (La.App. 4th Cir. 1992), and *Galle v. Coile,* 556 So.2d 957

(La.App. 3d Cir.1990). Thus American Waste argues that storing hazardous waste at Magnolia Landfill is at best an *arguable* violation of CERCLA and does not exempt the Police Jury from proving irreparable injury.

We recognize that the Third and Fourth Circuits, in the cases mentioned, have discussed a distinction between "clear" and "arguable" violations of law. This distinction, however, when drawn within the context of a preliminary injunction, is not appropriate. At a hearing for preliminary injunction, the trial court must determine whether the plaintiff has made a prima facie showing that he will prevail on the merits, and has shown either that he will suffer irreparable injury or that he is entitled to an exception from the requirement of showing irreparable injury. If the plaintiff fails to make his prima facie showing, he cannot obtain an injunction and the issue of irreparable injury or an exception is not reached. This is what happened in the *NOPSI* and *Hobbs* cases, supra; the trial court found the plaintiffs had failed to make a prima facie case and declined to grant preliminary injunctions. In both cases the Fourth Circuit affirmed, in effect reserving the question of a violation of law for trial on the merits. Until final resolution, the unproved claim of violation of law may be termed "arguable."

If, however, the trial court finds that the plaintiff has succeeded in making his prima facie case, and an element of that case is the defendant's violation of the law, the court should not then deny the injunction on grounds that the plaintiff has proved only an arguable violation of law. In these circumstances the showing of a violation of law is part of the plaintiff's prima facie case. If the plaintiff makes his prima facie case, then the distinction

between "clear" and "arguable" violations is artificial at best. The question should be couched in terms of the plaintiff's success or failure to make a prima facie showing of violation of law. For this reason we do not agree with the rationale of *Galle v. Coile*, supra, and decline to follow it.

In the instant case the trial court properly found that the Police Jury made its prima facie case. Since a large portion of its case is American Waste's violation of CERCLA, we cannot say that the Police Jury has not proved this violation clearly enough. On the contrary, it has proved the violation sufficiently to establish a prima facie case against American Waste. That American Waste feels its violation is only "arguable" is of no import, especially since all issues remain open after a hearing for preliminary injunction; this is, after all, interlocutory only and does not decide the merits of the case once and for all. *GMAC v. Daniels*, supra. The trial court was not plainly wrong to hold that the Police Jury need not show irreparable injury.

American Waste further argues that even if the Police Jury is relieved of showing irreparable injury, in order to support the preliminary injunction it must further show that it is without an adequate remedy at law. The violation of law exception, American Waste asserts, extends only to the requirement of showing irreparable injury and not to the suggested requirement that there be no adequate remedy at law. To this end, American Waste urges that CERCLA provides the Police Jury with an adequate remedy sufficient to obviate the issuance of an injunction, the citizen suits provisions of 42 U.S.C. § 9659.

In further support of this argument, American Waste cites numerous cases which treat "no adequate remedy at law" conjunctively with the statutory requirement of irreparable injury. See, e.g., *Prakasam v. Popowski*, 566 So.2d 189 (La.App.2d Cir.), writ denied 569 So.2d 986 (1990); *Hairford v. Perkins*, 520 So.2d 1053 (La.App. 3d Cir. 1987). We would note that the jurisprudence on this score is less than settled. Other cases discuss the standards disjunctively, as though they were alternative expressions of the same concept. *West v. Winnsboro*, 252 La. 605, 211 So.2d 665 (1968) (on rehearing); *Greenberg v. DeSalvo*, 254 La. 1019, 229 So.2d 83 (1969), cert. denied 397 U.S. 1075, 90 S.Ct. 1521, 25 L.Ed. 2d 809 (1970); *Caffery v. Powell*, 320 So. 2d 223 (La.App. 3d Cir. 1975); *Danzie v. Rutland*, 232 So.2d 303 (La.App. 2d Cir. 1970); *Amacker v. Amacker*, 146 So.2d 672 (La.App. 1st Cir. 1962) (en banc). Still other cases cite only the requirement of irreparable harm, consistent with a plain reading of art. 3601. *Daigre Engineers Inc. v. City of Winnfield*, 385 So.2d 866 (La.App. 2d Cir. 1980); *Melancon v. Assumption Parish Police Jury*, 231 So.2d 690 (La.App. 1st Cir.1970); *SREF Bon Marché Co. v. D.H. Holmes*, 572 So.2d 284 (La.App. 1st Cir. 1990), writ denied 576 So.2d 45 (1991); *Exquisito Food Serv. Inc. v. New Orleans Council of Aging*, 502 So.2d 1147 (La.App. 4th Cir. 1987). Finally, one case has held that "the lack of an adequate remedy at law is synonymous with irreparable harm and entitles one to injunctive relief." *J. Weingarten Inc. v. Northgate Mall Inc.*, 390 So.2d 527 (La.App. 3d Cir. 1980), rev'd on other grounds 404 So.2d 896 (1981), citing *Caffery v. Powell*, supra.

We recognize that some of these cases interpret "no adequate remedy at law" as distinct from, and additional

to, the statutory requirement of irreparable injury needed to obtain injunctive relief. These cases, however, do not address the "illegal action" exception that absolves the plaintiff from having to show irreparable injury. Article 3601, moreover, does not specify "no adequate remedy at law" as a requirement.

On the other hand, the lead cases for the illegal action exception do not require the plaintiff to make an additional showing of no adequate remedy at law. *Miller v. Knorr*, supra; *Hays v. City of Baton Rouge*, supra; *Smith v. West Virginia Oil & Gas Co.*, supra, and citations therein. In our view this approach is reasonable. It is supported by a plain reading of art. 3601. Besides, there is always the prospect of legal redress against defendants who violate the law; can this redress be considered an "adequate remedy at law"? If so, no petition for injunction urging violation of law would ever be successful, but this is clearly not the case. See *West v. Winnsboro, supra; Guzzardo v. Town of Greensburg*, 563 So.2d 424 (La. App. 1st Cir. 1990). Thus, once a plaintiff has made a prima facie showing that he will prevail on the merits and that the conduct he seeks to enjoin is reprobated by law, he is entitled to injunctive relief without any further requirement to show that no adequate remedy at law exists.

In sum, after finding that the Police Jury had made a prima facie showing that it will prevail on the merits and that it was not required to proved irreparable injury, the trial court was not plainly wrong to grant the preliminary injunction without proof that the Police Jury had no other adequate remedy at law.

Finally, American Waste urges the preliminary injunction was erroneously issued because it enjoins the actions of the Executive Branch of the United States government. In response, it suffices to say that the preliminary injunction herein is directed to American Waste, and no injunction or order of any kind has been issued against the EPA or the federal government; they are not even parties to the suit.

American Waste's fifth assignment lacks merit.

The Police Jury's appeal

The Police Jury filed a motion and order for appeal on May 12, 1992. In brief it contests the trial court's conclusion that the first two causes of action did not entitle the Police Jury to a preliminary injunction.

In the first cause of action, the Police Jury urged that ¶¶ 2.01 and 2.02 restricted the territorial scope of American Waste's operations to Ouachita Parish, thus prohibiting the company from importing waste such as the Dallas dirt from outside the parish; and that in obtaining a permit modification from DEQ, the company neither showed the "need" for modification nor kept the parish "fully informed" of the necessary modification. In the second cause of action, the Police Jury urged that ¶ 2.04 banned the company from receiving and disposing of "hazardous waste," and the Dallas dirt fits the contract's definition of "hazardous waste." In essence, the Police Jury now argues that the trial court was plainly wrong in finding that the Police Jury would not prevail on these contractual claims.

At the outset we would observe that the trial court's factual findings are vested with great discretion, and cannot be disturbed absent a showing of manifest error. *Rossell v. Esco*, 549 So.2d 840 (La.1989), and citations therein. The trial court's great discretion extends to findings based on purely documentary evidence. *Virgil v. American Guarantee & Liab. Ins. Co.*, 507 So.2d 825 (La.1987).

One of the contested portions of the contract, ¶ 2.04, is not a model of clarity. It obligates American Waste to accept for disposal "all material whatsoever, except hazardous waste, collected by any refuse hauler within the Parish of Ouachita." Does this mean that American Waste is prohibited from ever accepting, or has the option not to accept, any hazardous waste? And does this option extend only to hazardous waste delivered by a hauler, but not to that carried by parish residents in their personal automobiles, trailers and trucks? Given the ambiguity of this provision, we would be inclined simply to defer to the trial court's finding.

We are more guided, however, by the fact that the preliminary injunction is only an interlocutory decree. La.C.C.P. art. 3601; *GMAC v. Daniels*, supra. Unless the parties expressly agree to submit the case for final decision at the hearing on the rule for preliminary injunction, the principal demand for a permanent injunction is determined on its merits only after a full trial under ordinary process, even though the summary hearing on the rule for preliminary injunction may tentatively decide merit issues. *Equitable Petroleum v. Central Transmission Inc.*, supra, and citations therein. In the instant case the parties

have not submitted the issue of permanent injunction on the evidence adduced for the preliminary injunction.

Moreover, the evidence thus far adduced on the issue of territoriality is tentative at best. Don Clark, Waste Management's president in 1984, testified that the contract was not intended to limit the company; however, Arlan Rawls of the Police Jury testified his understanding was "it was going to be Ouachita Parish only." R.pp. 983, 552. Dr. Brent, of DEQ, admitted that the initial permits generated some confusion about the service area. R.p. 828. The evidence as to hazardous waste is equally inconclusive. Dr. Parent, a Police Jury witness, along with several of American Waste's witnesses, testified that the Dallas dirt was a CERCLA hazardous substance but not a RCRA hazardous waste. R.pp. 688-689 (Dr. Parent); 782 (Dr. Pier); 827 (Dr. Brent). The trial court did not address which definition activated ¶ 1.05's definition of a "hazardous substance." These are the kinds of questions that should be more carefully explored at the trial for the permanent injunction.[2]

In light of the procedural posture and the evidence adduced below, we are constrained to hold that when the trial court stated that it "rejects these arguments of the Police Jury and agrees with the position of American Waste," the court only meant that the Police Jury did not make a prima facie case for injunction on those causes of action. These issues are still alive and may be litigated at the trial on the merits. For purposes of the preliminary

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[2] The petition of intervention filed by Verdiacee Hampton-Goston has also not been formally disposed of.

injunction, however, we will defer to the trial court's discretion and not disturb these interlocutory findings.

The Police Jury's assignments or error lack merit.

Conclusion

For the reasons expressed, the trial court's judgment granting the preliminary injunction on the third cause of action but denying it on the first two is in all respects affirmed. Appellate costs are to be assessed one-half to American Waste and Pollution Control Company; the remaining costs are not assessed. La.R.S. 13:4521.

AFFIRMED.

OUACHITA PARISH POLICE JURY	*	NO. 92-0471 DIV.
VERSUS	*	FOURTH JUDICIAL DISTRICT COURT
AMERICAN WASTE & POLLUTION CONTROL COMPANY	*	PARISH OF OUACHITA
FILED: April 29, 1992	*	STATE OF LOUISIANA
	*	/s/ Illegible DEPUTY CLERK

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JUDGMENT AND ORDER OF PRELIMINARY INJUNCTION

After full and careful consideration of the pleadings, the briefs, the testimony taken and evidence submitted during the preliminary injunction hearing, and applicable law, IT IS ORDERED:

1.

That a preliminary injunction issue herein, without bond, directed to American Waste and Pollution Control Company restraining, enjoining, and prohibiting it, its agents, employees, and all persons, firms, or corporations acting or claiming to act on its behalf, or in concert with it, from accepting, placing, or allowing to be placed lead contaminated soil received directly or indirectly from the West Dallas lead site in the Magnolia Sanitary Landfill;

This preliminary injunction shall remain in force throughout the pendency of this proceeding.

Dated this 29th day of April, 1992.

/s/ John Harrison
JUDGE, 4TH JUDICIAL
DISTRICT COURT

Counsel for American Waste and Pollution Control Company agree only that the foregoing Judgment and Order correctly reflects the ruling of the Court.

/s/ Ben R. Hanchey
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COUNSEL FOR OUACHITA PARISH
POLICE JURY

STATE OF LOUISIANA
PARISH OF OUACHITA
FOURTH DISTRICT COURT

OUACHITA PARISH
POLICE JURY

VS. NO. 92-0471

AMERICAN WASTE AND
POLLUTION CONTROL
COMPANY

(Filed Apr. 21, 1992)

NOEL CULPEPPER
DEPUTY CLERK
OF COURT

REASONS FOR JUDGMENT

In this suit, the Ouachita Parish Police Jury (Police Jury) seeks a preliminary injunction to prohibit what it contends are violations of its contract with defendant, American Waste and Pollution Control Company (American Waste).

The facts are as follows: In 1983 the Police Jury solicited bids for the furnishing of a landfill site and landfill services for waste matter generated in Ouachita Parish. American Waste presented the successful bid. The agreement between the parties was reduced to writing in a contract and addenda executed in April and May of 1984. American Waste acquired a site in eastern Ouachita Parish and constructed a landfill, which it called Magnolia Landfill, and obtained the permits and licenses necessary for operation. It contracted with several other North Louisiana governmental bodies for landfill disposal services. Through the present, American Waste has provided the contracted services for all parties and has maintained the required State and Federal permits.

The U.S. Environmental Protection Agency (EPA) has undertaken to remove contaminated soil from an area in West Dallas, Texas. The site is approximately one square mile and is generally downwind from the location of an old smelter. Approximately 40,000 square yards of dirt containing lead, zinc, chromium, and other heavy metals will be removed. EPA, through its removal contractor, solicited bids for disposal of the contaminated soil from facilities in Texas, Oklahoma, Arkansas and Louisiana. A facility in Oklahoma City submitted the low bid. However, the State of Oklahoma, through its landfill regulatory agency, issued a moratorium on all lead disposal in that state to review the sufficiency of its regulations. American Waste submitted the next lowest bid. The Louisiana Department of Environmental Quality (DEQ) has ruled that the material meets state criteria for disposal here.

Section 2.14 of the contract between the Police Jury and American Waste provides:

> "American Waste shall conduct operations under this contract in compliance with all applicable Federal and State law."

The Police Jury contends that American Waste has breached this obligation, is violating Federal law, and may be enjoined without the necessity of showing irreparable injury. It argues that EPA and American Waste are in violation of § 121(d)(3) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). 42 U.S.C.A. § 9601 et seq.

That statute addresses cleanup standards as follows:

"In the case of any removal or remedial action involving the transfer of any hazardous substance or pollutant or contaminant offsite, such hazardous substance or pollutant or contaminant shall only be transferred to a facility which is operating in compliance with section 3004 and 3005 of the Solid Waste Disposal Act [42 U.S.C.A. § 6924 and 6925] (or, where applicable, in compliance with Toxic Substances Control Act [15 U.S.C.A. § 2601 et seq.] or other applicable Federal law) and all applicable State requirements. Such substance or pollutant or contaminant may be transferred to a land disposal facility only if the President determines that both of the following requirements are met:

(A) The unit to which the hazardous substance or pollutant or contaminant is transferred is not releasing any hazardous waste, or constituent thereof, into the groundwater or surface water or soil.

(B) All such releases from other units at the facility are being controlled by a corrective action program approved by the Administrator under subtitle C of the Solid Waste Disposal Act [42 U.S.C.A. § 9621 et seq.].

"The president shall notify the owner or operator of such facility of determinations under this paragraph."

42 U.S.C.A. § 9621(d)(3).

Sections 3004 and 3005 of the Solid Waste Disposal Act (42 U.S.C.A. § 6924 and 6925) are contained in Subchapter III (usually referred to as Subchapter C) which is

entitled "Hazardous Waste Management". The Magnolia Landfill is not a Subchapter C (42 U.S.C.A. § 6921 through 6939) facility. It is a non-hazardous waste facility licensed under Subchapter IV (usually referred to as Subchapter D). 42 U.S.C.A. § 6941 through 6948. Subchapter D. facilities are for "the disposal of solid waste which are environmentally sound . . . " 42 U.S.C.A. § 6941.

There is no evidence that the two requirements for land disposal under § 121(d)(3) are met at the Magnolia Landfill, and no Presidential notification to American Waste has occurred.

American Waste's position includes these arguments:

1. §121 (d)(3) of CERCLA outlines obligations and responsibilities of EPA and not of "receiving" facilities. CERCLA allegedly prohibits the *transfer* but not the *receipt* of the material.

2. § 121 (d)(3) authorizes transfer to a facility "(*where applicable,* in compliance with- . . . *other applicable Federal law*) and all applicable State requirements."

3. The regulations and policy of the EPA interpret § 121 (d)(3) to require simply that the facility to which such material is transferred be in compliance with the law "applicable" to the type of material that such facility is permitted to receive.

In regard to the first contention, the CERCLA prohibition provides that the *removal* or *remedial action* involving the transfer of a hazardous substance offsite *shall* only be as specifically set forth. CERCLA defines "removal" as

"the cleanup or removal of released hazardous substances from the environment, . . . the *disposal* of removed material, . . . " 42 U.S.C.A. § 9601 (23).

"Remedial action" is defined as "those actions consistent with permanent remedy taken instead of or in addition to removal actions . . . " It includes "offsite transport and *offsite storage*, treatment, destruction, or secure disposition of hazardous substances and associated contaminated materials." 42 U.S.C.A. § 9601(24).

As noted above, CERCLA defines "removal" to include the disposal of removed material, and "remedial action" to include the offsite storage. The wording of § 121 (d)(3), and the scope of the actions which will trigger removal of the hazardous substance, reflect Congressional intent that its prohibition was not to end when the contaminated soil was removed from the ground. The statute is also directed toward landfill facilities which will provide safe and permanent storage of the hazardous substances. Thus, the prohibition extends to offsite disposal and storage facilities such as, in this case, American Waste's Magnolia Landfill.

American Waste also argues that the transfer is in accordance with *"other applicable Federal law"* and pursuant to the regulations and policy of EPA.

This Court has not found, or been directed to, any *law* which authorizes the disposal of CERCLA hazardous substances in landfills licensed to receive only non-hazardous wastes. The Resource Conservation and Recovery Act (RCRA) does not authorize this cleanup method. 42 U.S.C.A. § 6901 et seq.

Mr. Warren Zehner, EPA Senior On-Scene Coordinator for the West Dallas Project, testified that the removal was pursuant to CERCLA. Pursuant thereto, the EPA found "an imminent and substantial danger" because of a release of a "hazardous substance" into the environment of the West Dallas residential area. This soil is classified as a CERCLA "hazardous substance" and CERCLA recognized that "when released into the environment (it) may present substantial danger to the public health or welfare or the environment . . . " 42 U.S.C.A. § 9601(14) and 9602(a).

Despite the EPA's finding under CERCLA, Mr. Zehner testified that EPA re-classified the same soil as non-hazardous for disposal purposes under the RCRA. He testified that an EPA directive authorized disposal of this CERCLA hazardous substance at a RCRA non-hazardous waste site such as the Magnolia Landfill.

Congress passed the CERCLA, sometimes referred to as the "Superfund", legislation to clean up the Nation's worse abandoned hazardous waste sites in a permanent and environmentally safe manner. Section 121 (d)(3) is not ambiguous. It is clear that Congress intended the CERCLA "cleanup" to encompass consistent treatment of the contaminated material throughout the process. In other words, the CERCLA mandate cannot be circumvented by EPA policies or directives which allow the same contaminated material to be re-analyzed under different standards (Toxicity Characteristic Leaching Procedure), for the final step in the CERCLA cleanup.

The parties to such circumvention of CERCLA, including the disposal landfill if not a Subtitle C facility,

are violating Federal law. The court finds that American Waste is disposing of the removed hazardous substance in violation of CERCLA.

The next question is whether the Police Jury may enjoin the violation of the law, or whether it is limited to a termination of the contract and an action on the bond for damages.

The contract between the parties provides:

> "15.01 All terms, conditions and specifications of the contract documents are considered material and failure to perform any part of the contract by American Waste shall be considered a breach of contract. Should American Waste fail to perform any of its contractual obligations, or cure any defaults under the contract within ten (10) days after written notification by the Ouachita Parish Police Jury to American Waste, then the contracting parties shall have the option to terminate the contract. . . . "

> "15.02 The obligation of American Waste is to provide the services agreed to herein. The remedy of the contracting parties in the event of a default is the termination of the contract, an action on the bond and an action against the company. . . . "

The following articles of our Civil Code are pertinent to the effects of obligations, including the right to specific performance:

> Art. 1758
> A. An obligation may give the obligee the right to:

(1) Enforce the *performance that the* obligor is bound to render;

(2) Enforce performance by causing it to be rendered by another at the obligor's expense;

(3) Recover damages for the obligor's failure to perform, or his defective or delayed performance.

B. (Rights of obligor omitted.)

Art. 1986.
Upon an obligor's failure to perform an obligation to deliver a thing, or not to do an act, or to execute an instrument, the court shall grant specific performance plus damages for delay if the obligee so demands. If specific perform [sic] once is impracticable, the court may allow damages to the obligee.

Upon failure to perform an obligation that has another object, such as an obligation to do, the granting of specific performance is at the discretion of the court.

Art. 1987.
The obliger may be restrained from doing anything in violation of an obligation not to do.

The contract between the Police Jury and American Waste does not contain a liquidated damage clause. It provides that in the case of a breach by American Waste, the Police Jury has the *option* to terminate the contract. Additionally, in the event of default, it permits "an action on the bond and *an action against the company.*" Emphasis added.

American Waste has constructed a landfill, and accepted and landfilled the waste material delivered from Ouachita Parish. Thus, it has rendered a substantial part of its performance and, apparently, the obligee does not want dissolution of the contract. Instead, the Police Jury wants to enforce the performance of Section 2.14. Specific performance may be compelled in an action against the company and the relief may include the preliminary relief sought herein, pending trial on the merits for the permanent injunction.

The Court finds that the Police Jury is not limited by the provisions of the contract or by the law to only an action to terminate the contract.

La. C.C.P. Art. 3601 provides: "An injunction shall issue in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or *in other cases specifically provided by law.*"

A plaintiff does not have to prove irreparable injury when he seeks to enjoin the defendant from a course of action forbidden by law. *Smith v. West Virginia Oil & Gas Co.*, 365 So.2d 269 (La. App. 2nd Cir. 1978) and *Miller v. Knorr*, 553 So.2d 1043 (La. App. 4th Cir. 1989).

The preliminary injunction is issued in the form and substance of the temporary restraining order, except it is limited to contaminated soil received directly or indirectly from the West Dallas hazardous waste site.

Since the decision in this matter will probably be appealed, the Court rules upon the other issues as follows:

The Police Jury argues that American Waste violated Section 2.01 by accepting waste for disposal which was generated from outside Ouachita Parish. Also, a violation of Section 2.04, as it argues, American Waste contracted not to receive any hazardous waste from any source for disposal at the landfill.

The Court rejects these arguments of the Police Jury and agrees with the position of American Waste.

American Waste was not prohibited from modifying its permits to increase the territorial scope of its landfill. The problem of hazardous waste acceptance or non-acceptance at the landfill was addressed only to the extent that American Waste was not obligated to accept this material from Ouachita Parish. In this regard, American Waste did not assume an obligation *not to do*, i.e. not to accept hazardous waste from any source.

Additionally, in regard to all the alleged contractual violations, the Police Jury did not meet its burden of proving irreparable injury. The position of American Waste is accepted in this regard.

In closing, the Court would like to commend the attorneys for both the Police Jury and American Waste for their diligent trial preparation, and their scholarly and comprehensive legal briefs.

MONROE, LOUISIANA, this 21th day of April, 1992.

/s/ John R. Harrison
JOHN R. HARRISON -
JUDGE

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

OUACHITA PARISH POLICE JURY

VERSUS

CIVIL NO. 92-0366
(Filed Mar. 23, 1992)

AMERICAN WASTE & POLLUTION COMPANY

RULING AND ORDER

This suit is REMANDED to State Court for lack of subject matter jurisdiction. Fed. R. Civ. Proc. 12(b)(1). IT IS SO ORDERED.

THUS DONE AND SIGNED IN Monroe, Louisiana this 23 day of March, 1992.

/s/ Donald E. Walter
JUDGE DONALD E. WALTER
UNITED STATES DISTRICT COURT

The Supreme Court of the State of Louisiana

OUACHITA PARISH POLICE JURY

VS. NO. 92-C-2953

AMERICAN WASTE AND POLLUTION CONTROL COMPANY

IN RE: American Waste/Pol. Control; – Defendant(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Second Circuit, Number 24415-CA; Parish of Ouachita Fourth Judicial District Court Div. "D" Number 92-471

December 11, 1992

Denied.

WFM
PFC
JLD
JCW
HTL
PH

Supreme Court of Louisiana
December 11, 1992

/s/ Illegible
Clerk of Court
For the Court

EXHIBIT A

STATE OF LOUISIANA

PARISH OF OUACHITA

BEFORE the undersigned Notaries Public, personally came and appeared the Ouachita Parish Police Jury, a political subdivision of the state of Louisiana, herein represented by its President, Billy J. Daniel, and American Waste and Pollution Control Company (American Waste), a corporation organized under the laws of the State of Louisiana, a wholly owned subsidiary of Waste Management, Inc., a Delaware Corporation, herein represented by L. Michael Collier, its agent, duly authorized so to act on behalf of the Corporation by resolution duly adopted by its Board of Directors, a certified copy of which is attached hereto as Exhibit A., and the City of Monroe, Louisiana, represented by its duly authorized Mayor, Robert E. Powell, per resolution attached, and the City of West Monroe, Louisiana, represented by its ___, ___, ___, per resolution attached, who stated and declared as follows:

WHEREAS the Ouachita Parish Police Jury did receive competitive bids on October 10, 1983, regarding the furnishing of a sanitary landfill site and solid waste disposal services for the Parish of Ouachita; and

WHEREAS American Waste and Pollution Control Company did submit the low bid therein;

NOW THEREFORE in consideration of the following mutual agreements and covenants, it contracted and agreed by and between the parties hereto as follows:

I.

DEFINITIONS

1.01 Contract Documents – This contract, and the addenda thereto and the contract performance bond.

1.02 Dead animals – animals or portions thereof equal to or exceeding 10 lbs. in weight that expire from any cause except those slaughtered or killed for human use or consumption.

1.03 Disposal site – the sanitary landfill site proposed to be developed by American Waste and permitted on the site known as the Sullivan Tract and located in the North one-half of Section 7 and in Section 12, Township 17 North, Range 5 East, Ouachita Parish, Louisiana, or such other site as may be designated by American Waste, approved by the Ouachita Parish Police Jury and permitted by the State of Louisiana.

1.04 Garbage and bulky waste – any and all dead animals less than 10 lbs. in weight except those slaughtered for human consumption, all accumulations of waste (animal, vegatable [sic] and/or other matter) that result from the preparation, processing, consumption, dealing, handling, packaging, canning, storage, transportation, decay or composition of meats, fish, fowl, birds, fruits, grains, or other animal or vegatable [sic] matter, including but by no way of limitation, used tin cans and other food containers and all putrescible or easily decomposable waste or vegetable matter which is likely to attract flies or rodents and all stoves, refrigerators, water heaters, automobile parts, washing machines, furniture or other waste material and all waste building materials

resulting from construction or remodeling or repair or demolishing operations.

1.05 Hazardous waste – any chemical, compound, mixture, substance, or article which is designated by U.S. Environmental Protection Agency or the Department of Natural Resources of the State of Louisiana, to be a hazardous or a toxic substance as terms defined by or pursuant to Federal, State or Parish rules, laws, or regulations.

1.06 Hauler – Any public or private hauler of garbage, rubbish, or other refuse who receives compensation from the producer of such garbage or other refuse or for the activities which produces such garbage or other refuse which is produced by a residential or commercial unit.

1.07 Rubbish – all waste wood, wood products, Christmas trees, tree trimmings, grass, cuttings, dead plants, weeds, leaves, dead trees or branches thereof, chips, shavings, sawdust, paper matter, pasteboard, rags, straw, used and discarded mattresses, used and discarded clothing, used and discarded shoes and boots, combustible waste pulp or other products such as used for packaging or wrapping crockery or glass, ashes, cinders, floor sweepings, glass, mineral or metallic substances and any and all other waste material not included in the definition of garbage and bulky waste or hazardous waste.

II.

SCOPE OF WORK

2.01 American Waste agrees, that subject to the issuance to American Waste of all final and non-appealable

licenses and permits to design, construct, and operate the sanitary landfill, it will accept and landfill all garbage and bulky waste, rubbish and other refuse delivered by the Parish, residents of the Parish, and public or private agencies domiciled in or operating in Ouachita Parish at the landfill site. Once duly licensed and permitted, American Waste will maintain and operate the landfill site in compliance with the conditions set forth in length in the American Waste application for a sanitary landfill permit to the Louisiana Department of Natural Resources. A copy of that application shall be made a part of this contract. Upon execution of this contract, American Waste agrees to proceed as expeditiously as possible to apply for all necessary licenses and permits. The objective of the parties to this contract is that all necessary licenses and permits shall have been obtained and that the landfill shall have been opened by June 1, 1984. American Waste shall not be deemed in default of its obligations under this contract if for reasons beyond its control the licenses and permits have not been obtained withith [sic] such time as to permit the opening of landfill by June 1, 1984. Until all final and non-appealable licenses and permits are granted to American Waste, its only obligation under this contract is to apply for and take such steps as it deems reasonable and appropriate to obtain such licenses and permits; it being recognized by the parties to this Agreement that the granting of permits and licenses is not a matter entirely within the hands of American Waste.

2.02 In the event that American Waste determines that permit modifications are needed, American Waste shall on its own and at its costs, secure such modification.

The Parish of Ouachita shall be kept fully informed of all such permit modifications.

2.03 All costs that are incurred in preparing the Sullivan Tract for sanitary landfill operations will be borne by American Waste. Such costs include but are not limited to the following:

A. Non-construction items such as soil borings, engineering drawings, surveys, and salt and water analysis, and

B. Construction items such as site clearance, road construction, ditch and levee construction, fence and building construction, utilities hook-up, environmental monitoring controls, fuel installation and other items.

2.04 American Waste agrees, subject to the issuance to it of all final and non-appealable licenses and permits to design, construct and operate the sanitary landfill, and as soon as practicable thereafter, to accept for disposal all garbage and bulky waste, rubbish and other refuse generated by residents of Ouachita Parish, whether delivered by automobile, trailer, or truck, and all material whatsoever, except hazardous waste, collected by any refuse hauler within the Parish of Ouachita. Individual residents of Ouachita Parish shall be permitted to dispose of personal, household waste without charge.

2.05 Rates for governmental refuse haulers who enter this waste disposal contract with American Waste shall be as follows:

From June 1, 1984, until December 31, 1985, the rate shall be $8.95 per ton. On December 31, 1985, and on each December 31 thereafter during the term of this Agreement, the rate shall be

adjusted and revised annually on January 1 of each year in an amount equal to the percentage change in the U.S. Dept. of Labor Consumer Price Index (CPI) for all urban customers of the Southern region of the United States, based upon the period January 1, 1985, until December 31, 1985. As soon as practicable after January 1, 1986, American Waste shall notify all parties utilizing sanitary landfill services provided in this contract of the adjustment in price. Parties of this contract designate the Ouachita Parish Police Jury as the agency for the discussion of price increases as provided in a written agreement for cooperative endeavor. Should there be any question with regard to the increase in price as provided hereunder, American Waste shall be obligated to document the basis for the increase in price which it has transmitted to all parties.

2.06 If for any reason beyond the control of American Waste (eg. changes in governmental regulations or the discontinuation of waste collection services by the Cities without contracting out such services, but excluding general inflationary factors such as raises in salaries and increases in costs of services), the cost of providing services is increased substantially, American Waste shall be entitled to an increase in the contract rate for disposal services. The amount of the price increase shall be determined by American Waste, and it shall submit economic data justifying the increase in contractual rate along with a notice of the increase. The rate increase will be effective thirty (30) days after notice is given, provided, however, any price change pursuant to this provision causing a need on the part of a governmental body to adjust budget line items may be postponed by said body for a period

not exceeding 90 days. The contracting bodies shall have the option, in the event of disagreement or disapproval of the rate increase, to terminate this contract one year after the effective date of the price increase, and they shall notify American Waste of the exercise of this option to terminate at least 90 days prior to termination.

2.07 If the volume of waste generated by residents entitled to free disposal services under this contract exceeds an average of 18 tons per day for a three month period, the Police Jury will pay American Waste the contract rate then in effect for each ton in excess of an eighteen ton per day average. This provision shall not be in effect during the first year of operation, however. Any payments due under this provision shall be made quarterly, withing [sic] 30 days after a statement is issued by American Waste to the Police Jury accompanied by reasonable documentation of the volume of waste received and disposed free of charge to Parish residents.

2.08 American Waste shall be responsible for securing all necessary permits and approvals from all Federal and State governmental agencies having jurisdiction over the operation of sanitary landfill operations. Further, American Waste shall comply with all lawful policies and all, health, sanitary and other regulations imposed by such Federal and State regulatory agencies having jurisdiction over sanitary landfill operations. Representatives of the contracting parties or their agents and representatives of Federal and State regulatory agencies shall be permitted to inspect the landfill site during working hours, upon reasonable notice.

2.09 American Waste shall keep the landfill site open and to accept garbage, rubbish and other refuse for disposal Monday through Saturday of each week during the hours of 7:00 a.m. through 6:00 p.m. Any reduction in the hours of operation shall be effective only upon approval by the contracting parties. In the event of emergency conditions declared by the Mayors of Monroe and West Monroe and the President of the Police Jury, American Waste will keep the landfill open for the disposal of unusual amounts of waste generated or caused by the emergency conditions.

2.10 The following holidays may be observed by American Waste on which dates the sanitary landfill site may, in the discretion of American Waste, be closed: New Years day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day, provided, however, that the landfill will remain open on any day the cities haul waste.

2.11 American Waste agrees to install, construct and maintain in good working order and to have available at all days in which the sanitary landfill site is open a scale to be used in weighing garbage, rubbish and other refuse transported to the landfill site during normal working hours.

2.12 The performance of this Agreement by American Waste may be suspended and the obligations thereunder excused in the event of and during the period that such performance is prevented, or delayed, by a cause or causes beyond the control of American Waste. Matters beyond the control of American Waste include, without

limitation, labor disturbances, acts of God, acts of governmental authorities, war, nuclear holocaust, accidents, riots, or damage or destruction of the premises and its facilities. In the event of disruption of services under such circumstances, American Waste shall take every reasonable effort to reopen the site to accept waste as soon as practicable after the cessation of the cause of suspension of services, and it shall take all reasonable steps to overcome the cause of cessation of services.

2.13 All complaints made directly to American Waste should be given prompt and courteous attention. American Waste agrees to notify the Ouachita Parish Police Jury of any complaints which have not been satisfactorily resolved within a reasonable period of time. American Waste agrees to provide the contracting parties a list of complaints which it receives on a quarterly basis.

2.14 American Waste shall conduct operations under this contract in compliance with all applicable Federal and State Law.

2.15 American Waste agrees to maintain the site in a manner consistent with the safe operation of vehicles owned by contracting and third persons and to provide and maintain safe access to the site.

III.

TERM OF CONTRACT

3.01 This contract shall be effective upon execution of the contract. The initial term of the agreement shall be for 5 years commencing on the date that the landfill first accepts non-hazardous solid waste for disposal, which

shall be as soon as practicable after all necessary permits are issued by all governmental bodies. The Ouachita Parish Police Jury acting pursuant to a written agreement for cooperative endeavor shall have the option to renew this contract with American Waste for one additional five year period, commencing at the end of the initial term. The option shall be deemed exercised unless the Parish notifies American Waste to the contrary at least 180 days prior to the end of the initial term.

3.02 This contract shall be automatically renewed for two successive five year periods commencing at the end of the first option period unless either party notifies the other of its desire to terminate this Agreement not less than 180 days prior to the termination of each successive option period.

3.03 If, after the first three years of any term of this contract, the contracting governmental units receive a bona fide (licensed, permitted and bonded offeror having a permitted site within a radius of 15 miles from the Ouachita Parish Courthouse) offer at least 20% less than the contract rate then in effect for the disposal of waste, American Waste will have a period of 90 days within which to match the price quoted by the offeror, and, if it does not agree to provide the services required under this contract at the reduced rate within said 90-day period, this contract shall terminate at the option of contracting parties 90 days after notice of the exercise of this option.

3.04 In the event that both municipal parties do not enter this contract, and in the further event that American Waste elects not to terminate this contract as provided in Section 15.07, the option provided in Section 3.03 shall

not be exercisable until the end of the fourth year of operation.

IV.

4.01 American Waste shall not discriminate against any person because of race, sex, age, creed, color, religion or national origin.

V.

5.01 American Waste shall indemnify, save harmless, and protect the contracting parties, their officers, agents, and employees from any and all suits, actions, legal proceedings, claims, demands, damages, costs of expenses and attorney's fees incident to any work done in performance of this contract and rising out of a willful or negligent act or omission of American Waste, its officers, agents, servants or employees.

VI.

6.01 American Waste shall at all times, after the site has been fully permitted as contemplated herein, maintain in full force and effect employers liability, workmen compensation, public liability, and property damage insurance including contractual liability insurance coverages provided under Section V. above. The contracting parties shall be named as an additionally named insured. All insurance shall be by insurers licensed and doing business in Louisiana and for the policy limits as stated hereafter. Before commencement of work hereunder, American Waste agrees to furnish to the Ouachita Parish

Police Jury and municipalities certificates of insurance or other evidence satisfactory to the contracting parties that such insurance has been paid and is in full force. This certificate shall contain the following express obligations. "This is to certify that the policies of insurance described herein have been issued to the insured for whom this certificate is executed and are in force at this time. In the event of cancellation or material change in the policy affecting the certificate holder, 30 days written notice will be given to the certificate holder." For the purpose of this contract, American Waste shall carry the following types of insurance in at least the limits specified as follows:

Coverages	Limits of liability
Workmans Compensation	Statutory
Employers Liability	$ 500,000.00
Bodily injury liability except auto	$ 500,000.00 ea. occurrence $1,000,000.00 aggregate
Property damage liability except auto	$ 500,000.00 ea. occurrence $1,000,000.00 aggregate
Automobile property damage liability and Bodily injury liability	$ 500,000.00 ea. occurrence $1,000,000.00 aggregate
Contractual liability	$ 500,000.00 ea. occurrence
Excess Umbrella liability	$5,000,000.00 ea. occurrence

VII.

7.01 American Waste will be required to furnish a corporate surety bond as security for its performance of this contract. The surety bond shall be in favor of the contracting parties in the amount of $1,000,000.00. A certificate from the surety showing the premium having been paid in full shall accompany the bond. The Surety on the bond shall be a duly authorized corporate surety company doing business in the State of Louisiana, and said surety company shall have a Best's rating of not less than "AAA".

VIII.

8.01 Attorney's-in-fact who sign performance bonds or contract bonds must file with each bond or certificate, a certified and effectively dated copy of their power of attorney.

IX.

9.01 The contract rate for disposal services required to be performed shall not exceed the rate fixed by and as adjusted in accordance with the provisions hereof.

X.

10.01 American Waste shall be responsible for the collection of any amounts due by any private or public hauler.

XI.

11.01 American Waste may not discontinue sanitary landfill disposal services to any public or private hauler

in Ouachita Parish as to waste generated in Ouachita Parish who is delinquent in the payment of any amounts due American Waste as a result of furnishing of landfill disposal services to such hauler. However, American Waste may require such public or private hauler who is delinquent in payment of any amount due American Waste to pay in cash or certified funds fees incurred with current deliveries of garbage, rubbish or other refuse to the sanitary landfill site.

XII.

12.01 No assignment of the contract or any right accruing under this contract shall be made wholly or in part by American Waste except to an affiliate without the express written consent by the contracting parties. In the event of any assignment, the assignee shall assume the liability of American Waste, but such assumption of liability shall not relieve American Waste of liability under this contract. For purposes of this part, affiliate means any company which is a wholly owned subsidiary of Waste Management, Inc. or which Waste Management, Inc. or a subsidiary thereof owns as least fifty-one (51%) percent thereof.

XIII.

13.01 The Ouachita Parish Police Jury and the Cities of Monroe and West Monroe agree that any garbage, bulky waste and rubbish collected by the Parish or the Cities or pursuant to a contract in which any of them is a principal party shall be disposed at the American Waste sanitary landfill site.

XIV.

14.01 American Waste shall continuously take such reasonable measures as may be proper to control and eliminate fires, smoke, odor, rodents, flies and all other public health menaces and pests on and around the landfill site. The landfill should be continuously policed by American Waste to prevent fires and blowing of paper or trash, and shall be kept neat and sanitary at all times. The landfill shall be covered at the end of each day's operation and the size of the "active face" on which garbage or other refuse is from time to time deposited shall be kept to a minimum.

XV.

15.01 All terms, conditions and specifications of the contract documents are considered material and failure to perform any part of the contract by American Waste shall be considered a breach of contract. Should American Waste fail to perform any of its contractual obligations, or cure any defaults under the contract within ten (10) days after written notification by the Ouachita Parish Police Jury to American Waste, then the contracting parties shall have the option to terminate the contract. Further, in the event American Waste shall be adjudged bankrupt either by voluntary or involuntary proceedings, then this contract shall immediately terminate and in no event shall this contract be, or treated as, an asset of American Waste after adjudication of bankruptcy. If American Waste shall be proven to be insolvent or fail in business then this contract may be terminated at the option of the contracting parties.

15.02 The obligation of American Waste is to provide the services agreed to herein. The remedy of the contracting parties in the event of default is the termination of the contract, an action on the bond and an action against the company. American Waste is not precluded from any activity which does not unreasonably interfere with its obligation to provide this service.

15.03 A minimum buffer zone of 200 feet shall be maintained be American Waste from the property line of property leased by American Waste for the purpose of maintaining a sanitary landfill site at all times during the term of this contract, unless less buffer zone is agreed to in writing by the affected, adjoining property owner (s).

15.04 This contract shall have no binding force or effect until it has been executed by the duly authorized representative of each contracting party.

15.05 The Ouachita Parish Police Jury agrees that it will accept no further waste at the existing Parish landfill on June 1, 1984, or at such earlier or later date that the American Waste landfill shall be fully operational and opened for business.

15.06 The term "contracting parties" means the Ouachita Parish Police Jury, The City of Monroe, and The City of West Monroe, or, those who actually approve and sign this agreement.

15.07 If this contract should not be signed by all the parties identified herein above within 45 days from the date of execution by American Waste, this contract shall be automatically void and of no force or effect whatsoever. This provision and Section 15.04 are for the

benefit and protection of American Waste, and not withstanding said provisions, American Waste shall have the option to elect to proceed with and be bound by the terms hereof. In such event, the governmental units which have approved and executed this contract shall likewise be bound by the terms hereof. American Waste shall give notice in writing to the contracting parties if it elects to exercise this option.

15.08 This is a contract for the performance of certain actions and the provisions for the services outlined herein by American Waste. Under no circumstances or conditions shall the operation of the landfill by American Waste in accordance with this contract be deemed a public function, nor have the contracting governmental units acquired any interest in land or real property by virtue of this contract. If the contract should be executed before the execution or recording of a formal agreement of lease for landfill use, the recording of this contract shall not be an encumbrance or have any effect on any real estate described generally herein.

15.09 Notwithstanding Section 13.01, nothing in this contract requires that any of the contracting governmental bodies haul refuse to the landfill for which it or its residents have use.

15.10 In the event American Waste elects to proceed with construction on the strength of a contract with less than all of the contracting parties, the other(s) shall be entitled to the benefits of this contract for a period of not less than 120 days after the execution of the contract by American Waste, or until such later date that would not

necessitate the hiring of additional personnel or the purchase of additional equipment.

STATE OF Louisiana
Parish of Ouachita

Thus done and passed on this 1st day of May, 1984.

WITNESSES:
/s/ Illegible
/s/ Illegible

AMERICAN WASTE AND POLLUTION CONTROL, CORP.
By; /s/ L. Michael Collier

/s/ Illegible
NOTARY PUBLIC
(Please type or print name)
My commission expires at death.

STATE OF LOUISIANA
PARISH OF OUACHITA

Thus done and passed on this 1st day of May, 1984.

WITNESSES:
/s/ Illegible
/s/ Illegible

OUACHITA PARISH POLICE JURY

BY: /s/ Billy Daniel
PRESIDENT

/s/ Illegible
NOTARY PUBLIC

Thus done and passed on this 27th day of April, 1984.

WITNESSES:
/s/ Illegible
/s/ Illegible

THE CITY OF MONROE
BY: /s/ Illegible

/s/ Thomas Gardner, Jr.
NOTARY PUBLIC

Thus done and passed on this ___ day of _____, 1984.

WITNESSES:
_____
_____

THE CITY OF WEST MONROE

BY: _____

_____
NOTARY PUBLIC

ADDENDUM NO. I.

TO CONTRACT BETWEEN OUACHITA PARISH, THE CITIES OF MONROE AND WEST MONROE, AND AMERICAN WASTE

In addition to the provisions of Section 15.01 of the Contract, if the default has not been cured, and if the landfill has been closed for a period of ten (10) consecutive days, without lawful cause, the contracting governmental units shall enjoy a concurrent right with American Waste to dispose of garbage, bulky waste and rubbish at the Sullivan site and to use the facilities of American Waste. This is a present assignment subject to the suspensive condition of the preceding sentence. American Waste agrees to make provisions for this assignment in all contracts affecting its right to use the Sullivan tract.

The rights created hereunder shall terminate after a reasonable period of time for the contracting governmental units to locate and permit a site, and these rights shall be further suspended if American Waste cures the default prior to the landowner terminating its interest in the land and the location of another site by the contracting governmental units.

The contracting governmental units shall have complete and total liability for any pollution or environmental problems caused by them during the operation of the landfill pursuant to this clause, and they shall assume all responsibility to third persons for damages arising out of the operation of the site.

In the event of default and operations by the governmental unit pursuant to this Addendum, the governmental bodies agree to pay their proportionate share of the rental or charges due the owner of the land on which the site is located.

For as long as American Waste operates the site concurrently with the governmental units, in event of default, it will retain management and direction authority with respect to the disposal of waste by the governmental units, and it will retain full responsibility for pollution and environmental problems as long as it retains direction and control of the disposition of waste.

WITNESS:

/s/ Illegible

AMERICAN WASTE AND POLLUTION CONTROL CORP.

By /s/ L. Michael Collier (5/1/84)

WITNESS:

/s/ Illegible

OUACHITA PARISH POLICE JURY

By /s/ Billy Daniel

WITNESS:

/s/ Thomas Gardner Jr.

THE CITY OF MONROE

By /s/ Illegible

WITNESS:

_____

THE CITY OF WEST MONROE

By _____

ADDENDUM NO. II.

TO CONTRACT BETWEEN OUACHITA PARISH, THE CITIES OF MONROE AND WEST MONROE, AND AMERICAN WASTE

Section 3.03 of this Contract is amended to eliminate the requirement that the competing offer be at least twenty percent (20%) less than the Contract rate in effect at the time of the offer.

Further, it shall not be necessary that the offeror have at the time of the offer a licensed, permitted and bonded facility, but it must demonstrate sufficient financial responsibility to complete the construction of the facility by a date certain, guaranteed by a performance bond in the amount of One Million ($1,000,000.00) Dollars.

If American Waste has not agreed to meet the lower offer within ninety (90) days after the bond is posted (the condition of the bond being that the offeror shall permit and open a facility within six (6) months after the decision of American Waste and provide the service at the offered price at least until the end of the term of the American Waste Contract), the governing bodies shall have the option to terminate the Contract on 180 days notice. Section 3.03 is further clarified to explicitly include an offer for any waste disposal system permitted by law, not necessarily a landfill.

Any reduction in the rate charged by American Waste pursuant to this provision shall go into effect 180 days after notification of its agreement to reduce the price.

If any party elects to terminate based on this provision, the Contract rate shall be renegotiated with the remaining parties if less than all governmental bodies elect to terminate.

The Contract remains otherwise unchanged except as amended.

WITNESS:

/s/ Illegible

AMERICAN WASTE AND POLLUTION CONTROL CORP.

By /s/ L. Michael Collier (5/1/84)

WITNESS:

/s/ Illegible

OUACHITA PARISH POLICE JURY

By /s/ Billy Daniel

WITNESS:

/s/ Thomas Gardner Jr.

THE CITY OF MONROE

By /s/ Illegible

WITNESS:

_____

THE CITY OF WEST MONROE

By _____

AMERICAN WASTE AND POLLUTION CONTROL COMPANY

CERTIFICATE

I, John B. Furman, the duly qualified and Assistant Secretary of AMERICAN WASTE AND POLLUTION CONTROL COMPANY, a Louisiana Corporation, hereby certify that the following is a true and complete copy of a resolution of the Board of Directors of said Corporation duly adopted by unanimous written consent dated January 13, 1984.

> RESOLVED: That the Corporation be and it hereby is authorized, directed and empowered to enter into a contract by and between the Corporation and the Quachita [sic] Parish, together with the Cities of Monroe and West Monroe for the construction and operation and subsequent receipt of refuse at the facilities to be permitted and constructed and operated by American Waste and Pollution Control Company.
>
> BE IT FURTHER RESOLVED: That Donald C. Clark, President, or Michael Collier be and each of them hereby is authorized, directed and empowered to execute and deliver for and on behalf of the Corporation, any and all agreements, contracts, documents, certificates, deeds and memoranda deemed by him to be necessary and appropriate to effect the herein authorized resolution.

DATED: January 13, 1984

/s/ John B. Furman
John B. Furman, Assistant Secretary

EXHIBIT B

[p. 218] WARREN ZEHNER, a witness, called on behalf of the Defendant, first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Percy:

Q. Mr. Zehner, would you state your name and address for the record please?

A. My name is Warren Zehner, 5638 Duck Creek, No. J, Garland, Texas.

Q. Mr. Zehner, by whom are you employed?

A. The United States Environmental Protection Agency, Region 6, which is Dallas.

Q. And what is your job title at the present time?

A. I'm a senior on-scene coordinator.

Q. Does your employment carry any other designation other than senior on-scene coordinator?

A. No, it doesn't.

Q. What is your educational background, Mr. Zehner?

A. I have a bachelor of science in marine biology and minor in chemistry and over forty hours towards a graduate degree in systematic biology and a minor in geology.

Q. How long have you been employed by the EPA?

A. A little over . . . since 1988, about four years.

Q. Having you been serving in the capacity of on-scene coordinator throughout that period of employment with the EPA?

A. That's correct.

Q. Prior to your employment with the EPA by whom were you employed?

A. Before going to EPA, I was employed with Ecology and Environment, a consulting firm to EPA's Removal Program, and [p. 219] prior to that, after I left graduate school, I was employed by Roy F. Weston, also in a contracting capacity to the EPA Removal Program. So I'm been in the EPA Removal Program . . . will be eight years in August.

Q. Mr. Zehner, would you describe the duties and responsibilities of an on-scene coordinator, a senior on-scene coordinator with the EPA?

A. Senior on-scene coordinators and on-scene coordinators in general are responsible for all aspects of emergency response as far as EPA is concerned, and also one of our primary functions is to conduct site assessments, extent of contamination surveys, evaluate the risks that are present on a site, you know, as outlined in the National Contingency Plan, and then make recommendations for removal actions under the Super-Fund Program if conditions on the site warrant.

Q. So in summary you're in charge of the on-site activity for the EPA?

A. That's correct.

Q. Specifically, Mr. Zehner, what is your present duty assignment as on-scene coordinator?

A. My present duty assignment is the West Dallas RSR site assessment and removal action, and I've been working in that capacity since August the 8th of 1991.

Q. Is that the EPA action that has generated the waste material that has been transported to the Magnolia Landfill?

A. That's correct.

Q. And how long have you actually been employed at that site?

A. I've been working at that site since August the 8th of '91.

Q. Can you describe for the Court, Mr. Zehner, exactly what has transpired since August of 1988 in the assessment of that site and the assessment of the activity of the EPA at that site?

[p. 220] A. August of '88 or August of '91?

Q. I'm sorry, August of '91.

A. Okay. In August of '91 I was brought into the site basically because I'm the regional expert on smelters and residential lead removals, and I have extensive experience in that over the last couple of years, but to transgress a little bit, in July we were referred to the site by the Texas Water Commission, who is the equivalent of Department of Environmental Quality. They brought me into it, like I say, August the 8th, and I began an extent of contamination survey in approximately a one square mile

area down wind of the . . . of the old RSR Smelter. In the pursuing months since then we've pulled in excess of a thousand samples characterizing the area. We've pulled both grid samples on large areas but also individual residences, front and back yards, and this was done so I could know what kind of lead concentration or metal concentration I was dealing with at a particular place, and then composite samples of those samples that I already had taken from our archives were sent into the lab for TCLP analysis to determine RCRA hazardous waste versus RCRA non-hazardous waste, and based on those analysis I instructed my contractor, my prime removal contractor, Riedel Environmental Services, and their AKA or DBA, doing business as, Riedel Peterson in Region 6 to solicit bids from facilities that could take RCRA non-hazardous waste based on TCLP analysis and bids from facilities that can take RCRA hazardous waste based on TCLP analysis.

Q. Did you actually perform any analytical tests regarding the waste designated for disposal at the Magnolia Sanitary Landfill?

A. Yes, we did.

[p. 221] Q. And what were the results of those tests, Mr. Zehner?

A. All of the . . . the samples that we sent in, the composite samples, which you know I already had sample results from several locations in the area. I took parts of those, aliquots of those, and combined that into a composite, sent that into the lab, two of those, and both of those sample results we analyzed for full priority pollutants, which is . . . covers everything that the other

gentleman testified to, organics, inorganics, you know, volatiles, pesticide PCB's, everything. Plus we did a TCLP analysis on metals, and both of those samples came back with results that, you know, based on the RCRA regulations of EPA are considered RCRA non-hazardous waste.

Q. When you use the terminology RCRA, Mr. Zehner, for the benefit of everyone in the courtroom who may not be familiar with it, what does RCRA stand for?

A. RCRA is the Resource Conservation and Recovery Act, which are the federal regulations that govern solid waste, and in this particular case they . . . RCRA regs., at least from EPA's standpoint and the way that's . . . the programmatic regulation is done, is almost exclusively RCRA . . . the programmatic regulation is done, is almost exclusively RCRA . . . is hazardous waste. Non-Hazardous waste is routinely delegated through grants to the state, like in Louisiana it's relegated to the Department of Environmental Quality, and then also there are, you know, certain applicable state regulations regarding solid waste and non-hazardous waste under the RCRA definition.

Q. Mr. Zehner, the analytical testing that you did on the waste designated for disposal at the Magnolia Sanitary Landfill, was that testing done pursuant to the regulations promulgated with regard to such waste?

A. That's correct.

[p. 222] Q. And are those the regulations promulgated by the EPA?

A. Yes, that's correct.

Q. And the analytical testing data revealed that this waste under those regulations was non-hazardous waste, is that correct?

A. That's correct.

Q. Can you very briefly describe what the sampling protocol was for testing that waste?

A. Like I say, the . . . Let me clarify your question. The way we pull the samples or –

Q. – Exactly. For the benefit of the Court, how exactly did you pull the samples of the waste designated for disposal at Magnolia?

A. Okay, the . . . during the site assessment we collected samples, you know, in a couple of different manners. We collected them from two hundred by two hundred foot grids using thirteen distinct points and then composited that into a sample to represent . . . to statistically represent that whole area, and we sent that in for analysis, and then in residential areas we sampled the front yard and the back yard using five distinct point and composited that into one sample. And then when we got all those sample results back, then what I did was I kept an archive of those samples, which means I kept a duplicate, and then what we did is, you know, we would like those up based on concentration and then pull representatives from each one of those, that I already knew what the results were, put that into a jar, homogenized it, mixed it up, composited it, and sent that to the lab, and then had them run the full priority pollutant screen on its to establish if it was within the regulatory limitations for hazardous or non-hazardous under RCRA. So, you know,

I already knew . . . You know, I already know what the concentration is in each [p. 223] individual spot. So you know I know the areas that, you know, I thought would pass and could be sent to Magnolia, so I used these . . . those sample results to verify, and that's what I used to profile, and compositing is a real routine manner of doing that in the profiling process.

Q. So that sampling protocol is an approved sampling protocol for such testing –

A. –That's correct –

Q. – of sites like this, is that correct?

A. That's correct.

By. Mr. Levine: Judge, I'd like to object, he's leading his own witness a little excessively. He's not an expert.

By the Court: Well, try to refrain from leading.

by Mr. Percy: Yes, sir.

Q. For purposes of identification, Mr. Zehner, the Plaintiff has introduced a document I believe that was listed as P-11. Would you review this document and identify it for the record please?

A. Most of the material in here is information that I submitted to the Magnolia Landfill as part of the profiling process for acceptance of this waste into the facility, and it has my profile sheet. It has analytical data that I submitted. It has a letter of mine to Glen Miller, and there's some records of communication between myself and Mr. Bouchereau. That's pretty much it.

Q. So those are documents that you submitted to the facility –

A. –That's correct –

Q. – with regard to this waste material?

A. That's correct.

[p. 224] Q. Is there anything in there that you did not submit to the facility? You indicated that most of that was . . . or are you just suggesting that you submitted those at different times or is there anything in there that you did not submit to the facility?

A. The . . . I didn't send this right here. This appears to have been sent from MBA LAB to the facility, but it also appears to be a duplicate of the analytical work that I had submitted as part of the profile.

Q. A duplicate that is already –

A. –Right –

Q. – previously included in the package?

A. That's correct.

Q. Other than that particular document, those are the documents that you submitted to the facility with respect to this waste?

A. Right. Well, you've got a couple of deals right here on the front that appear to be internal Waste Management paperwork.

Q. Which are the Special Waste Management Decision document –

A. – Right –

Q. – and the Special Waste – File Contents document? –

A. –Right. Right.

Q. Following that is the information that you submitted –

A. – Right, everything . . . right. –

Q. – other than the information that you have noted was . . . appears to have been faxed to the facility by MBA Labs, is that correct?

A. Right. Well, and also the . . . the records of conversation. I mean even though I had the conversation with Paul Bouchereau, those are not . . . I mean those are his –

Q. – Those are not your records?

[p. 225] A. Right, they're his records.

Q. Does that contain all of the information that you recall submitting to the facility with respect to this waste?

A. That's correct.

Q. And are those the results of the analytical tests that you described earlier which designated this waste as non-hazardous waste?

A. That's correct.

Q. Prior to shipment of the waste to the Magnolia facility is a determination made regarding the eligibility of such a facility to receive such waste?

A. That's correct. The EPA has a policy generally referred to as the off-site policy, which prevents any EPA funded lead . . . where we're the lead on a removal, the generator of the material, to take any waste to a facility that is not in compliance with what we commonly refer to as the off-site policy, and what the off-site policy states is that the facility must be in compliance and in good standing with all applicable state and/or federal regulations regarding that particular facility.

Q. Pursuant to the EPA regulations and the off-site policy to which you have referred, did you make such a determination regarding the Magnolia Sanitary Landfill?

A. Yes, I did. In January . . . Seems like it was about mid January, mid to early January, I contacted the Louisiana Department of Environmental Quality Office of Solid Waste and tried to reach Mr. Jim Brent who was out at the time, and I talked to one of his staff personnel about the facility, and he told me that the facility was in compliance and had no problems. –

By Mr. Levine: – Judge, I'm sorry, I'd like to [p. 226] object to hearsay testimony, out of court conversations with out of court people who are not parties.

By the Court: Well, I think it kind of goes to explain his actions, and it would be subject to an exception. So I'm going to admit it subject to your objection.

By Mr. Levine: Thank you, Judge.

Q. Please continue, Mr. Zehner.

A. Okay, and after I had that conversation we followed up in a conversation with Mr. Brent, and you know, EPA followed up, and you know, Mr. Brent as the department head of the Office of Solid Waste verified everything that the staff person had told me. So EPA deemed that the facility was acceptable under the off-site policy.

Q. And is that a determination that is made by the on-scene coordinator, yourself, at that site?

A. That's correct.

Q. Now, Mr. Zehner, did anyone else do any analytical testing of this material that was transported to the Magnolia Sanitary Landfill?

A. On February 5th and 6th I sent loads, two loads on each day, to the landfill, and at the landfill both vehicles were sampled by the Department of Environmental Quality and . . . to have wet analysis and TCLP lead analysis done, and their analysis supported and was commensurate with my data that showed that this met the regulatory definition of RCRA non-hazardous waste.

Q. And you have actually reviewed the analytical data supplied by the Department of Environmental Quality?

[p. 227] A. That's correct.

Q. Mr. Zehner, with respect to your responsibilities and your duties as on-scene coordinator, do your responsibilities and duties include the transport of the material from the site to the disposal location?

A. That's correct. In my capacity as an on-scene coordinator I'm responsible for all applicable federal regulations and to be in compliance also with state regulations. You know, and this goes beyond CERCLA. It goes to Clean Air Act. It goes to OSHA. It goes to DOT, the Department of Transportation, and I have to make sure that when the . . . when any type of transport leaves a facility were I'm loading the material, that to the best of my knowledge that it is in compliance with all applicable transportation regulations, and in so doing I, you know- . . . You know, this covers placarding, manifesting, lining of trucks with Visqueen or polyethylene liners, secure tarping on the trucks, and you know, looking at the trucks to make sure that they're in decent shape and, you know, can make it to the landfill. You know, I mean I wouldn't send a truck out that had a hole the size of a, you know, a number three wash tub in it. You know, it just . . . you make sure that to the best of your ability and the best of your knowledge that . . . that they're in compliance.

Q. With respect to the shipments of waste that occurred on February the 5th and 6th, did you indeed inspect the vehicles that were transporting those loads?

A. That's correct. I visually inspected the trucks, you know, as they were leaving the facility to make sure that the tarps were on there, that they had the manifests that I had signed, which is a requirement in the State of Texas but not as a . . . but it's not a requirement in the State of Louisiana for this [P. 228] particular type of waste, and everything appeared to be okay.

Q. Can you describe briefly how the material is loaded into the trucks and how it is secured in the truck?

A. Okay, in this particular case we're using twenty-two yard aluminum end dumps, and the end dumps . . . a liner is put in there, a Visqueen liner, and then line the sides of the truck and the bottom. The material is deposited into the truck, you know, in such a manner that it meets all its axling weight specifications, and then after we've, you know, done that and it's within the legal weight limits, below 80,000 pounds and its axles are okay, then we fold the Visqueen back on top of the waste, and then the shipper puts a tarp on it, and the tarps are generally, you know, of such a construction that they're . . . that they're fitted to the trailer, and then those tarps are secured with . . . with the bungie cords. And then the guys that do the loading do a visual inspection to make sure that there's no clods or anything that's on the truck from the loading process, and then we either weigh the trucks on site or we send them to a weigh station, get an official weight to make sure that we're legal, and then they give me a copy of the . . . my Generator 1 copy of the manifest, and then the trucks go to the landfill or the disposal facility.

By Mr. Percy: I have no further questions at this time, Your Honor.

By the Court: Cross.

* * *

[p. 229] CROSS EXAMINATION

By Mr. Levine:

Q. Mr. Zehner, I've Steve Levine, represent Ouachita Parish Police Jury. Your undergraduate college degree is in systematic biology, correct?

A. No, graduate work.

Q. Graduate work, and your undergraduate degree was in marine biology? –

A. – Marine biology.

Q. So you have a biological background?

A. That's correct.

Q. And then you've worked as a consultant?

A. That's correct.

Q. All right. Mr. Zehner, under what federal law was this material removed from where it originally existed in Dallas and gathered for this disposal?

A. It was removed under CERCLA authority.

By the Court: I'm sorry, I didn't hear that, under what?

By Mr. Zehner: Under CERCLA Super-Fund.

Q. Would you tell the Judge what CERCLA stands for?

A. It's the Compensation . . . No, . . . Comprehensive Environmental Response, Compensation, and Liability Act.

Q. That's a different act from RCRA, isn't it?

A. That's correct.

Q. What is . . . You described RCRA as being a federal law that regulates waste disposal, primarily hazardous waste disposal, is that right?

A. That's . . . That's primarily what EPA regulates.

Q. Yeah. What does CERCLA regulate?

[p. 230] A. CERCLA has to do with . . . with hazardous chemicals. It has to do with the release of hazardous chemicals from facilities, the uncontrolled release of chemicals from hazardous waste facilities, and also makes provisions for the clean-up of those through either removal action or a remedial action, and it can either be done as a fund lead or as a PRP lead.

Q. What is the thing or the substance or the kind of material that triggers CERCLA action? What is the term in the statute?

A. The term of art that's used in the removal program is imminent substantial endangerment.

Q. Imminent and substantial endangerment because of the release of what kind of thing?

A. Well, it can either be from the release or the potential release –

Q. – All right–

A. – of hazardous substances, pollutants –

Q. – Hazardous substance?

A. And/or materials.

Q. Okay, pollutants, contaminants?

A. Right.

Q. All right, Is there a list of hazardous substances that the federal government publishes in the Code of Federal Regulations?

A. That's correct.

Q. And if something appears on the list, then it's a hazardous substance under CERCLA, right?

A. That's correct.

Q. Okay. Is that hazardous substance list under CERCLA, is that the same thing as a list of hazardous waste under RCRA, or is it different?

A. It's different.

[p. 231] Q. Could you explain in which way, sir?

A. The CERCLA list is just what it states, it's a list of hazardous substances. Under RCRA, RCRA breaks things down into either a characteristic waste based on TCLP or it breaks it down into a particular waste stream that it came from. Waste waters are general your K waste, and processed waste you can get F waste, or the U and the P waste are, you know, can be abandoned . . . Generally U's and P's are abandoned unused products.

Q. What kind of waste according to that categorization is this RCRA waste that has been picked up in Dallas? It's characteristic, is that right?

A. Well, it's characteristic waste if it leaches about five part per million TCLP. If it does not meet TCLP, then it falls under what's called a Subtitle D waste, at least that's . . . that's the term we use, which –

Q. – What does that mean?

A. Subtitle D is a designation that's used for a . . . in RCRA for a landfill that does not take RCRA hazardous waste.

Q. Is this waste Subtitle D. waste?

A. Based on the TCLP analysis that we have, yes, it is.

Q. Does this waste contain CERCLA hazardous substances despite the fact that it is a Subtitle D waste?

A. That's correct.

Q. you don't have any disagreement that . . . with Dr. Parent when he described . . . the substances that he described from the EPA as being hazardous substances under RCRA . . . under CERCLA, do you?

By Mr. Hanchey: Your Honor, for the record we'll make this general, the questions concerning the witness's [p. 232] interpretation of the law are improper to this witness.

By the Court: Well, I'm going to admit it subject to the objection.

By Mr. Levine: Thank you, Judge.

By the Court: And I'll make the objection general and the ruling general.

By Mr. Hanchey: Thank you, Your Honor.

By the Court: You can go ahead and answer –

A. – Okay, could you clarify that please?

Q. Yes, sir, I'm sorry. You were in the courtroom when Dr. Parent testified that the data that he saw, part of Plaintiff 11 which you just finished looking at, –

A. – Right, right –

Q. – contained data analyses that showed hazardous . . . CERCLA hazardous substances in the waste from Dallas?

A. That's correct.

Q. Do you have any disagreement with his characterization of those substances as hazardous substances under CERCLA?

A. No, I don't.

Q. Now in plain ordinary terms why, under authority of CERCLA, did the EPA decide to remove this dirt from where it lay in Dallas?

A. The results of the samples that we took in consultation with the Agency for Toxic Substance and disease Registry, the . . . and based on, you know, the use of a pharmacological model, which is in EPA now, the uptake biokinetic model, a recommendation by myself was made that in a residential setting the lead that was found in the residential setting that these people are exposed to everyday constituted an imminent substantial endangerment.

[p. 233] Q. So the waste was removed because it was dangerous to people, right?

A. In the particular setting that it was in.

Q. What was the square mile size . . . what is the square mile size of the area from which this stuff . . . all of it, not just what you classified as TCLP . . . but all of it, what's the size of the area that you're working in?

A. The area that I'm currently working in is approximately a square mile.

Q. If the same waste, the same soil, that was originally present within this area were present in a residential area in Monroe, would it be hazardous or dangerous and need to be removed?

A. I would be inclined . . . under the exact same conditions in Monroe I would make the same recommendation.

Q. That it be removed?

A. That's correct.

Q. Are you aware of any way by which the dangerous qualities or the hazardous qualities of the substances in the soil are changed or reduced by picking them up and moving them some place else and burying them, apart from different access?

A. Okay, a different . . . different exposure scenario?

Q. Yeah, yeah.

A. Other than exposure the material is unchanged.

Q. So the lead from Dallas is the lead in Monroe, isn't that right?

A. That's correct.

Q. Now you mentioned I believe the term emergency response?

A. That's correct.

Q. Is this CERCLA action by the EPA in Dallas an emergency response?

A. No, emergency response is . . . and I'll clarify this, I know [p. 234] what you're getting at. Emergency response is like when you have, you know, a train derailment, and you've got stuff on fire, stuff leaking everywhere, and the term of art that's used here is what's considered a classic emergency, and a classic emergency means that, in the context of this, is that the situation, you know, in West Dallas needed immediate action, and immediate action is not like, you know, tomorrow. It's within the next few weeks. I mean the wheels of bureaucracy grind slowly. So immediate action to us may not necessarily be immediate action to everybody else, but that's . . . the action memorandum is a classic emergency.

Q. That means that your interest as EPA on-site coordinator was to get this stuff picked up and taken out of Dallas as fast as possible?

A. My interest was to get it up and out of the residential setting that it's in. Currently the material is stored in a controlled batch house, and I mean . . . I'm out of storage capacity. That's why I'm trying to find a . . . a design final repository for it. By my concern was to get it away from the people's home and the residences and, you know, to reduce their exposure.

Q. You considered other sites as an appropriate final resting place for the Subtitle D component of this waste, didn't you.

A. There were other facilities considered by my contractor. My contractor did all the negotiations, Riedel Peterson.

Q. Are you familiar with those negotiations? Do you know what sites were considered?

A. Yes, I know what sites were considered.

Q. Please identify the other sites that were considered?

A. The other sites that were considered, let's see, was Green Acres Facility in Tecumseh, Oklahoma; Lade Law Facility in [p. 235] Oklahoma City; BFI in Monroe and Sinton, Texas; the Magnolia Landfill; and Western Waste in Texarkana, Arkansas and Conroe, Texas.

Q. Is that complete to your memory and your knowledge?

A. Right.

Q. All right. All of these facilities were considered, some in Louisiana, some in Texas, some in Arkansas I believe?

A. Well, one in Arkansas and two in Oklahoma.

Q. All right. Why was Magnolia chosen over those facilities?

A. Magnolia was chosen because they were the . . . the lowest qualified bid.

Q. Do all of these facilities that were considered have similar permitting, in that are they all Subtitle D facilities, or are any of them Subtitle C facilities?

A. No, they're all Subtitle D. There's differences in state regulations, but they're all Subtitle D.

Q. They're all non-hazardous solid waste facilities, right?

A. RCRA non-hazardous, correct.

Q. Right. And the reason that the waste came here or wants to come here is because of financial reasons basically?

By Mr. Percy: Objection, Your Honor, that's a mischaracterization of the witness's testimony.

By the Court: Well, why don't you rephrase that?

By Mr. Levine: All right, sir.

Q. The primary reason for choosing Magnolia was low bidder as a qualified facility, correct?

A. Yeah, that's . . . that's pretty much correct, lowest qualified bidder.

Q. Tell me what you mean by qualified facility?

A. A qualified facility is a facility that under the state [p. 236] regulations, which I said earlier that everything is pretty much passed down to the states, that it is in compliance with the state regulations and it is designed to accept industrial waste or Subtitle D waste, and then basically, you know, once the facility . . . the

state tells us that the facility is designed and acceptable to take it, then it boils down to who's the lowest bidder, and you know, in the federal government I'm charged as the custodian of federal funds to get the most for the best price.

Q. Mr. Zehner, was there a lower bid from any of these facilities?

A. Yes, there was.

Q. And from whom was the lower bid?

A. The . . . what was it . . . Lade Law up in Oklahoma City was lower.

Q. And that bid was not accepted, correct?

A. That's correct, because the facility was not qualified.

Q. Why was the facility in Oklahoma not qualified?

A. Because the State of Oklahoma Health Department who regulates the landfills in Oklahoma, just like DEQ does here, had placed a moratorium on all lead disposal in the State of Oklahoma, irregardless of whether it originated in Oklahoma or outside of Oklahoma, because they were concerned . . . Oklahoma has got a lot of lead sites, and they were concerned about, you know, lead going in, you know, because there's several forms and different leachable capacities of lead. They declared a moratorium to do a survey and a study of the landfills to see if they wanted to change state regulations, and it's my understanding that that study is being completed and they're, you know, in the process of, you know, amending some kind of regulations or something.

[p. 237] Q. So the health department in Oklahoma showed a special concern about lead in RCRA non-hazardous landfills, right?

A. That's correct.

Q. And that's the reason that the Lade Law facility in Oklahoma, which was the low bidder in this deal, wasn't chosen, right? That's why they weren't qualified?

A. Right, yeah, the State of Oklahoma, like I say, had put a moratorium on all facilities in Oklahoma.

Q. It wasn't that the landfill up there was substandard compared to the Magnolia Landfill or any of the others, was it?

A. No.

Q. Now you mentioned that there were some Texas sites that were also part of this bidding process?

A. That's correct.

Q. Were the bids of any of these Texas sites lower than the bid submitted by the Magnolia facility?

A. No, they weren't

Q. I'd like to ask you a question about what you call the off-site policy. The off-site policy is part of the statute of CERCLA, isn't it? Isn't that where you find the off-site policy in the law?

A. The off-site policy is . . . is just that. It's . . . You know, not being an attorney I don't know if it's . . . if it's part of the statute. I mean it's a directive. It's a policy.

Q. Okay.

A. The . . . So I mean to my knowledge it's not written into part of the law, but here again, I'm not a lawyer, so –

Q. –I understand, sir. You do know the difference between a statute and a regulation or do you? I know you're not an attorney. I'm not trying to –

A. – Well, no, not really.

[p. 238] Q. Is there a piece of paper or pieces of paper that contains the off-site policy?

A. Right, there's an OSWER directive.

Q. All right, what does OSWER stand for?

A. Office of Solid Waste and Emergency Response in EPA.

Q. Okay. So the OSWER directive is where the off-site policy comes from, right?

A. Right, in the context we use it.

Q. All right. And it's a directive from within the EPA?

A. That's correct.

Q. You don't know whether it's a regulation?

By Mr. Hanchey: Your Honor, I'm going to continue my objection. I think he's gone far afield on this –

By the Court: – Well, let's see if he knows. I'll admit it subject to the objection if he knows. If he doesn't know, he can just tell us.

By Mr. Levine: He has spoken about regulations and so forth as part of his job duties, so –

A. – Well, you know, here again, you know, to my knowledge it is a policy, you know, a policy statement and not a regulation.

Q. All right, so if I said that it's not a regulation, you couldn't dispute that, could you?

A. Well, I could ask you to show me where it is in 40CFR.

Q. It's not in 40CFR.

By Mr. Percy: Objection, Your Honor, we have the attorney testifying now.

By the Court: You need to . . . I sustain that objection.

[p. 239] By Mr. Levine: Thank you, Judge.

Q. And with regard to whether the off-site policy appears in CERCLA in the statute, you have no knowledge of that?

A. No.

Q. Okay. So to you the off-site policy is a directive from the EPA, which –

A. – That's correct.

Q. And it's your job to follow that, isn't it?

A. That's correct.

Q. What is the off-site policy there for? What does it do? Would you explain to the Judge what off-site policy means?

A. What the off-site policy is, is that EPA had concerns when we started doing removal actions and spending, you know, Super-Fund funds and taking it to a facility that we may have to go back to ten years from now that's leaking and we've got, you know, a lot bigger problem. So the . . . You know, and here again, it's my understanding from . . . the reason the policy was promulgated was to make sure that the places that EPA took waste, from an EPA funded removal action, were operated in a . . . in a safe manner; it was . . . they were designed to accept the particular type of waste that we were taking there, whether it be for incineration, whether it be for landfilling, whether it be for deep well injection; that they have a good regulatory history; and that they're in compliance with applicable state and/or federal regulations. And that's my understanding, and that's the understanding that I work with, you know, in my duty as an OSC.

Q. And it's also your understanding as the person whose job it is and whose job it was here to implement this EPA policy?

A. That's correct.

Q. It was your understanding that the waste from Dallas, if it [p. 240] passed TCLP, it was RCRA nonhazardous waste.

Q. Right.

A. That under the off-site policy that it was appropriate and correct to order it shipped to Magnolia Landfill?

A. That's correct.

Q. All right. Does that then mean . . . or it does mean actually, doesn't it, sir, that the EPA through you, as the actor for the EPA here, has assumed that CERCLA through the off-site policy allows non RCRA or RCRA non-hazardous waste to be sent off-site to a Subtitle D facility?

A. That's correct.

Q. Okay. Now the reason that the off-site policy exists you said was because there was concern that if you pulled stuff up from someplace, you want to put it in the right place once you get to the final resting place?

A. That's correct.

Q. Why is that, sir?

A. Like I stated, the . . . when we pick something up, you know, we don't want to come back, you know. We don't want to send it to a facility . . . See, we're the generator, and as the generator we assume . . . you know, we become a PRP. If we send it to a facility –

Q. – I'm not sure the Judge knows what a PRP is.

A. Potentially responsible party. Somebody that is . . . that under CERCLA law you can go back and seek cost recovery from as a contributor or a generator to a problem. And we don't want to put it into a facility that, you know, is not designed to take it, that is going to store it improperly, manage it improperly, to where there is . . . a release occurs, I mean an active release from a storage area, and something that's going to cause a problem to where we're going to have to come back [p. 241] and do a removal action or a remedial action somewhere in the future.

Q. And that is a testimony to the difficulties of dealing with waste and the difficulties of putting waste in landfills generally, isn't it?

A. That's probably the most difficult part of my job, is trying to find an acceptable repository, whether it be through an incinerator, deep well landfill, you know, for any particular type of waste, whether it be Subtitle D or Subtitle C.

Q. Are there . . . What is the trend in the number of landfills? Are there more landfills all the time or fewer? Do you know?

A. Well, actually the . . . from what I've been seeing here recently is that there . . . there seems to be a lot of hazardous facilities coming on-line in . . . or maybe I'm just finding out about them. I mean that could be part of it too, because a lot of them are real remote in the deserts of the west.

Q. Now why would they be remote in the deserts of the west?

A. Well, basically because of the prevailing attitude of NIMBY, not in my background. And, you know, I mean you can get into geological questions and you can get into stuff, but you know, the basic prevailing thing that I personally have seen is that everybody wants you to clean stuff up, but nobody wants you to . . . nobody wants to have a landfill anywhere that I can put it, and that's . . . that's what's commonly referred to as NIMBY or what we're using now as NOPE, not on planet earth. So –

Q. – Not in the state of Oklahoma.

A. I mean I'm not trying to be frivolous here, but I mean that's

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§ 9621. Cleanup Standards

(a) Selection of remedial action. The President shall select appropriate remedial actions determined to be necessary to be carried out under section 104 [42 USCS § 9604] or secured under section 106 [42 USCS § 9606] which are in accordance with this section and, to the extent practicable, the national contingency plan, and which provide for cost-effective response. In evaluating the cost effectiveness of proposed alternative remedial actions, the President shall take into account the total short- and long-term costs of such actions, including the costs of operation and maintenance for the entire period during which such activities will be required.

(b) General rules. (1) Remedial actions in which treatment which permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances, pollutants, and contaminants is a principal element, are to be preferred over remedial actions not involving such treatment. The offsite transport and disposal of hazardous substances or contaminated materials without such treatment should be the least favored alternative remedial action where practicable treatment technologies are available. The President shall conduct an assessment of permanent solutions and alternative treatment technologies or resource recovery technologies that, in whole or in part, will result in a permanent and significant decrease in the toxicity, mobility, or volume of the hazardous substance, pollutant, or contaminant. In making such assessment, the President shall specifically address the long-term effectiveness of various alternatives. In assessing alternative remedial actions, the President shall, at a minimum, take into account:

(A) the long-term uncertainties associated with land disposal;

(B) the goals, objectives, and requirements of the Solid Waste Disposal Act;

(C) the persistence, toxicity, mobility, and propensity to bioaccumulate of such hazardous substances and their constituents;

(D) short- and long-term potential for adverse health effects from human exposure;

(E) long-term maintenance costs;

(F) the potential for future remedial action costs if the alternative remedial action in question were to fail; and

(G) the potential threat to human health and the environment associated with excavation, transportation, and redisposal, or containment.

The President shall select a remedial action that is protective of human health and the environment, that is cost effective, and that utilizes permanent solutions and alternative treatment technologies or resource recovery technologies to the maximum extent practicable. If the President selects a remedial action not appropriate for a preference under this subsection, the President shall publish an explanation as to why a remedial action involving such reductions was not selected.

(2) The President may select an alternative remedial action meeting the objectives of this subsection whether or not such action has been achieved in practice at any other facility or site that has similar characteristics. In making such a selection, the President may take into

account the degree of support for such remedial action by parties interested in such site.

(c) Review. If the President selects a remedial action that results in any hazardous substances, pollutants, or contaminants remaining at the site, the President shall review such remedial action no less often than each 5 years after the initiation of such remedial action to assure that human health and the environment are being protected by the remedial action being implemented. In addition, if upon such review it is the judgment of the President that action is appropriate at such site in accordance with section 104 or 106 [42 USCS § 9604 or 9606], the President shall take or require such action. The President shall report to the Congress a list of facilities for which such review is required, the result of all such reviews, and any actions taken as a result of such reviews.

(d) Degree of cleanup. (1) Remedial actions selected under this section or otherwise required or agreed to by the President under this Act shall attain a degree of cleanup of hazardous substances, pollutants, and contaminants released into the environment and of control of further release at a minimum which assures protection of human health and the environment. Such remedial actions shall be relevant and appropriate under the circumstances presented by the release or threatened release of such substance, pollutant, or contaminant.

(2)(A) With respect to any hazardous substance, pollutant or contaminant that will remain onsite, if –

(i) any standard, requirement, criteria, or limitation under any Federal environmental law,

> including, but not limited to, the Toxic Substances Control Act, the Safe Drinking Water Act, the Clean Air Act, the Clean Water Act, the Marine Protection, Research and Sanctuaries Act, or the Solid Waste Disposal Act; or
>
> (ii) any promulgated standard, requirement, criteria, or limitation under a State environmental or facility siting law that is more stringent than any Federal standard, requirement, criteria, or limitation, including each such State standard, requirement, criteria or limitation contained in a program approved, authorized or delegated by the Administrator under a statute cited in subparagraph (A), and that has been identified to the President by the State in a timely manner,

is legally applicable to the hazardous substance or pollutant or contaminant concerned or is relevant and appropriate under the circumstances of the release or threatened release of such hazardous substance or pollutant or contaminant, the remedial action selected under section 104 [42 USCS § 9604] or secured under section 106 [42 USCS § 9606] shall require, at the completion of the remedial action, a level or standard of control for such hazardous substance or pollutant or contaminant which at least attains such legally applicable or relevant and appropriate standard, requirement, criteria, or limitation. Such remedial action shall require a level or standard of control which at least attains Maximum Contaminant Level Goals established under the Safe Drinking Water Act and water quality criteria established under section 304 or 303 of the Clean Water Act [33 USCS § 1314 or 1313], where such goals or criteria are relevant and

appropriate under the circumstances of the release or threatened release.

(B)(i) In determining whether or not any water quality criteria under the Clean Water Act is relevant and appropriate under the circumstances of the release or threatened release, the President shall consider the designated or potential use of the surface or groundwater, the environmental media affected, the purposes for which such criteria were developed, and the latest information available.

(ii) For the purposes of this section, a process for establishing alternate concentration limits to those otherwise applicable for hazardous constituents in groundwater under subparagraph (A) may not be used to establish applicable standards under this paragraph if the process assumes a point of human exposure beyond the boundary of the facility, as defined at the conclusion of the remedial investigation and feasibility study, except where –

(I) there are known and projected points of entry of such groundwater into surface water; and

(II) on the basis of measurements or projections, there is or will be no statistically significant increase of such constituents from such groundwater in such surface water at the point of entry or at any point where there is reason to believe accumulation of constituents may occur downstream; and

(III) the remedial action includes enforceable measures that will preclude human exposure to the contaminated groundwater at any point between the facility boundary and all known

and projected points of entry of such groundwater into surface water

then the assumed point of human exposure may be at such known and projected points of entry.

(C)(i) Clause (ii) of this subparagraph shall be applicable only in cases where, due to the President's selection, in compliance with subsection (b)(1), of a proposed remedial action which does not permanently and significantly reduce the volume, toxicity, or mobility of hazardous substances, pollutants, or contaminants, the proposed disposition of waste generated by or associated with the remedial action selected by the President is land disposal in a State referred to in clause (ii).

(ii) Except as provided in clauses (iii) and (iv), a State standard, requirement, criteria, or limitation (including any State siting standard or requirement) which could effectively result in the statewide prohibition of land disposal of hazardous substances, pollutants, or contaminants shall not apply.

(iii) Any State standard, requirement, criteria, or limitation referred to in clause (ii) shall apply where each of the following conditions is met:

(I) The State standard, requirement, criteria, or limitation is of general applicability and was adopted by formal means.

(II) The State standard, requirement, criteria, or limitation was adopted on the basis of hydrologic, geologic, or other relevant considerations and was not adopted for the purpose of precluding onsite remedial actions or other land disposal for reasons unrelated to protection of human health and the environment.

(III) The State arranges for, and assures payment of the incremental costs of utilizing, a facility for disposition of the hazardous substances, pollutants, or contaminants concerned.

(iv) Where the remedial action selected by the President does not conform to a State standard and the State has initiated a law suit against the Environmental Protection Agency prior to May 1, 1986, to seek to have the remedial action conform to such standard, the President shall conform the remedial action to the State standard. The State shall assure the availability of an offsite facility for such remedial action.

(3) In the case of any removal or remedial action involving the transfer of any hazardous substance or pollutant or contaminant offsite, such hazardous substance or pollutant or contaminant shall only be transferred to a facility which is operating in compliance with section 3004 and 3005 of the Solid Waste Disposal Act [42 USCS §§ 6924 and 6925] (or, where applicable, in compliance with the Toxic Substances Control Act or other applicable Federal law) and all applicable State requirements. Such substance or pollutant or contaminant may be transferred to a land disposal facility only if the President determines that both of the following requirements are met:

(A) The unit to which the hazardous substance or pollutant or contaminant is transferred is not releasing any hazardous waste, or constituent thereof, into the groundwater or surface water or soil

(B) All such releases from other units at the facility are being controlled by a corrective action program approved by the Administrator

under subtitle C of the Solid Waste Disposal Act [42 USS [sic] §§ 6921 et seq.].

The President shall notify the owner or operator of such facility of determinations under this paragraph.

(4) The President may select a remedial action meeting the requirements of paragraph (1) that does not attain a level or standard of control at least equivalent to a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation as required by paragraph (2) (including subparagraph (B) thereof), if the President finds that –

(A) the remedial action selected is only part of a total remedial action that will attain such level or standard of control when completed;

(B) compliance with such requirement at that facility will result in greater risk to human health and the environment than alternative options;

(C) compliance with such requirements is technically impracticable from an engineering perspective;

(D) the remedial action selected will attain a standard of performance that is equivalent to that required under the otherwise applicable standard, requirement, criteria, or limitation, through use of another method or approach;

(E) with respect to a State standard, requirement, criteria, or limitation, the State has not consistently applied (or demonstrated the intention to consistently apply) the standard, requirement, criteria, or limitation in similar circumstances at other remedial actions within the State; or

> (F) in the case of a remedial action to be undertaken solely under section 104 [42 USCS § 9604] using the Fund, selection of a remedial action that attains such level or standard of control will not provide a balance between the need for protection of public health and welfare and the environment at the facility under consideration, and the availability of amounts from the Fund to respond to other sites which present or may present a threat to public health or welfare or the environment, taking into consideration the relative immediacy of such threats.

The President shall publish such findings, together with an explanation and appropriate documentation.

(e) Permits and enforcement. (1) No Federal, State, or local permit shall be required for the portion of any removal or remedial action conducted entirely onsite, where such remedial action is selected and carried out in compliance with this section.

(2) A State may enforce any Federal or State standard, requirement, criteria, or limitation to which the remedial action is required to conform under this Act in the United States district court for the district in which the facility is located. Any consent decree shall require the parties to attempt expeditiously to resolve disagreements concerning implementation of the remedial action informally with the appropriate Federal and State agencies. Where the parties agree, the consent decree may provide for adminstrative enforcement. Each consent decree shall also contain stipulated penalties for violations of the decree in an amount not to exceed $25,000 per day, which may be enforced by either the President or the State. Such stipulated penalties shall not be construed to impair or

affect the authority of the court to order compliance with the specific terms of any such decree.

(f) State involvement. (1) The President shall promulgate regulations providing for substantial and meaningful involvement by each State in initiation, development, and selection of remedial actions to be undertaken in that State. The regulations, at a minimum, shall include each of the following:

(A) State involvement in decisions whether to perform a preliminary assessment and site inspection.

(B) Allocation of responsibility for hazard ranking system scoring.

(C) State concurrence in deleting sites from the National Priorities List.

(D) State participation in the long-term planning process for all remedial sites within the State.

(E) A reasonable opportunity for States to review and comment on each of the following:

(i) The remedial investigation and feasibility study and all data and technical documents leading to its issuance.

(ii) the planned remedial action identified in the remedial investigation and feasibility study.

(iii) The engineering design following selection of the final remedial action.

(iv) Other technical data and reports relating to implementation of the remedy.

(v) Any proposed finding or decision by the President to exercise the authority of subsection (d)(4).

(F) Notice to the State of negotiations with potentially responsible parties regarding the scope of any response action at a facility in the State and an opportunity to participate in such negotiations and, subject to paragraph (2), be a party to any settlement.

(G) Notice to the State and an opportunity to comment on the President's proposed plan for remedial action as well as on alternative plans under consideration. The President's proposed decision regarding the selection of remedial action shall be accompanied by a response to the comments submitted by the State, including an explanation regarding any decision under subsection (d)(4) on compliance with promulgated State standards. A copy of such response shall also be provided to the State.

(H) Prompt notice and explanation of each proposed action to the State in which the facility is located.

Prior to the promulgation of such regulations, the President shall provide notice to the State of negotiations with potentially responsible parties regarding the scope of any response action at a facility in the State, and such State may participate in such negotiations and, subject to paragraph (2), any settlements.

(2)(A) This paragraph shall apply to remedial actions secured under section 106 [42 USCS § 9606]. At least 30 days prior to the entering of any consent decree, if the President proposes to select a remedial action that does

not attain a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation, under the authority of subsection (d)(4), the President shall provide an opportunity for the State to concur or not concur in such selection. If the State concurs, the State may become a signatory to the consent decree.

(B) If the State does not concur in such selection, and the State desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State shall intervene in the action under section 106 [42 USCS § 9606] before entry of the consent decree, to seek to have the remedial action so conform. Such intervention shall be a matter of right. The remedial action shall conform to such standard requirement, criteria, or limitation if the State establishes, on the administrative record, that the finding of the President was not supported by substantial evidence. If the court determines that the remedial action shall conform to such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State may become a signatory to the decree. If the court determines that the remedial action need not conform to such standard, requirement, criteria, or limitation, and the State pays or assures the payment of the additional costs attributable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be so modified and the State shall become a signatory to the decree.

(C) The President may conclude settlement negotiations with potentially responsible parties without State concurrence.

(3)(A) This paragraph shall apply to remedial actions at facilities owned or operated by a department, agency, or instrumentality of the United States. At least 30 days prior to the publication of the President's final remedial action plan, if the President proposes to select a remedial action that does not attain a legally applicable or relevant and appropriate standard, requirement, criteria, or limitation, under the authority of subsection (d)(4), the President shall provide an opportunity for the State to concur or not concur in such selection. If the State concurs, or does not act within 30 days, the remedial action may proceed.

(B) If the State does not concur in such selection as provided in subparagraph (A), and desires to have the remedial action conform to such standard, requirement, criteria, or limitation, the State may maintain an action as follows:

> (i) If the President has notified the State of selection of such a remedial action, the State may bring an action within 30 days of such notification for the sole purpose of determining whether the finding of the President is supported by substantial evidence. Such action shall be brought in the United States district court for the district in which the facility is located.
>
> (ii) If the State establishes, on the administrative record, that the President's finding is not supported by substantial evidence, the remedial action shall be modified to conform to such standard, requirement, criteria, or limitation.
>
> (iii) If the State fails to establish that the President's finding was not supported by substantial

evidence and if the State pays, within 60 days of judgment, the additional costs attributable to meeting such standard, requirement, criteria, or limitation, the remedial action shall be selected to meet such standard, requirement, criteria, or limitation. If the State fails to pay within 60 days, the remedial action selected by the President shall proceed through completion.

(C) Nothing in this section precludes, and the court shall not enjoin, the Federal agency from taking any remedial action unrelated to or not inconsistent with such standard, requirement, criteria, or limitation.

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§ 9613. Civil proceedings

(a) Review of regulations in Circuit Court of Appeals of the United States for the District of Columbia. Review of any regulation promulgated under this Act may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained under this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

(b) Jurisdiction; venue. Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this Act, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

* * *

(h) Timing of review. No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 of the United States Code (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 121 [42 USCS § 9621] (relating to cleanup standards) to review any challenges to removal or remedial action

selected under section 104 [42 USCS § 9604], or to review any order issued under section 106(a) [42 USCS § 9606(a)], in any action except one of the following:

(1) An action under section 107 [42 USCS § 9607] to recover response costs or damages or for contribution.

(2) An action to enforce an order issued under section 106(a) [42 USCS § 9606(a)] or to recover a penalty for violation of such order.

(3) An action for reimbursement under section 106(b)(2) [42 USCS § 9606(b)(2)].

(4) An action under section 310 [42 USCS § 9659] (relating to citizens suits) alleging that the removal or remedial action taken under section 104 [42 USCS § 9604] or secured under section 106 [42 USCS § 9606] was in violation of any requirement of this Act. Such an action may not be brought with regard to a removal where a remedial action is to be undertaken at the site.

(5) An action under section 106 [42 USCS § 9606] in which the United States has moved to compel a remedial action.

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§ 9604. Response authorities

(a) Removal and other remedial action by President; applicability of national contingency plan; response by potentially responsible parties; public health threats; limitations on response; exception. (1) Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment. When the President determines that such action will be done properly and promptly by the owner or operator of the facility or vessel or by any other responsible party, the President may allow such person to carry out the action, conduct the remedial investigation, or conduct the feasibility study in accordance with section 122 [42 USCS § 9622]. No remedial investigation or feasibility study (RI/FS) shall be authorized except on a determination by the President that the party is qualified to conduct the RI/FS and only if the President contracts with or arranges for a qualified person to assist the President in overseeing and reviewing the conduct of such RI/FS and if the responsible party agrees to reimburse the Fund for any

cost incurred by the President under, or in connection with, the oversight contract or arrangement. In no event shall a potentially responsible party be subject to a lesser standard of liability, receive preferential treatment, or in any other way, whether direct or indirect, benefit from any such arrangements as a response action contractor, or as a person hired or retained by such a response action contractor, with respect to the release or facility in question. The President shall give primary attention to those releases which the President deems may present a public health threat.

(2) Removal action. Any removal action undertaken by the President under this subsection (or by any other person referred to in section 122 [42 USCS § 9622]) should, to the extent the President deems practicable, contribute to the efficient performance of any long term remedial action with respect to the release or threatened release concerned.

(3) Limitations on response. The President shall not provide for a removal or remedial action under this section in response to a release or threat of release –

(A) of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found;

(B) from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures; or

(C) into public or private drinking water supplies due to deterioration of the system through ordinary use.

(4) Exception to limitations. Notwithstanding paragraph (3) of this subsection, to the extent authorized by this section, the President may respond to any release or threat of release if in the President's discretion, it constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner.

§ 9611. Uses of fund

(a) In general. For the purposes specified in this section there is authorized to be appropriated from the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Code of 1986 [26 USCS §§ 9501 et seq.] not more than $8,500,000,000 for the 5-year period beginning on the date of enactment of the Superfund Amendments and Reauthorization Act of 1986 [enacted Oct. 17, 1986], and such sums shall remain available until expended. The preceding sentence constitutes a specific authorization for the funds appropriated under title II of Public Law 99-160 [unclassified] (relating to payment to the Hazardous Substances Trust Fund). The President shall use the money in the Fund for the following purposes:

> (1) Payment of governmental response costs incurred pursuant to section 104 of this title [42 USCS § 9604], including costs incurred pursuant to the Intervention of the High Seas Act [33 USCS §§ 1471 et seq.].

§ 6941. Objectives of 42 USCS §§ 6941 et seq.

The objectives of this subtitle [42 USCS §§ 6941 et seq.] are to assist in developing and encouraging methods for the disposal of solid waste which are environmentally sound and which maximize the utilization of valuable resources including energy and materials which are recoverable from solid waste and to encourage resource conservation. Such objectives are to be accomplished through Federal technical and financial assistance to States or regional authorities for comprehensive planning pursuant to Federal guidelines designed to foster cooperation among Federal, State, and local governments and private industry. In developing such comprehensive plans, it is the intention of this Act [42 USCS §§ 6901 et seq.] that in determining the size of the waste-to-energy facility, adequate provision shall be given to the present and reasonably anticipated future needs, including those needs created by thorough implementation of section 6002(h) [42 USCS § 6962(h)], of the recycling and resource recovery interest within the area encompassed by the planning process.

§ 6941a. Energy and materials conservation and recovery

(a) The Congress finds that –

(1) significant savings could be realized by conserving materials in order to reduce the volume or quantity of material which ultimately becomes waste;

(2) solid waste contains valuable energy and material resources which can be recovered and

used thereby conserving increasingly scarce and expensive fossil fuels and virgin materials;

(3) the recovery of energy and materials from municipal waste, and the conservation of energy and materials contributing to such waste streams, can have the effect of reducing the volume of the municipal waste stream and the burden of disposing of increasing volumes of solid waste;

(4) the technology to conserve resources exists and is commercially feasible to apply;

(5) the technology to recover energy and materials from solid waste is of demonstrated commercial feasibility; and

(6) various communities throughout the nation have different needs and different potentials for conserving resources and for utilizing techniques for the recovery of energy and materials from waste, and Federal assistance in planning and implementing such energy and materials conservation and recovery programs should be available to all such communities on an equitable basis in relation to their needs and potential.

§ 6942. Federal guidelines for plans

(a) Guidelines for identification of regions. For purposes of encouraging and facilitating the development of regional planning for solid waste management, the Administrator, within one hundred and eighty days after the date of enactment of this section [enacted Oct. 21, 1976] and after consultation with appropriate Federal, State, and local authorities, shall by regulation publish guidelines for the identification of those areas which have

common solid waste management problems and are appropriate units for planning regional solid waste management services. Such guidelines shall consider –

(1) the size and location of areas which should be included,

(2) the volume of solid waste which should be included, and

(3) the available means of coordinating regional planning with other related regional planning and for coordination of such regional planning into the State plan.

(b) Guidelines for State plans. Not later than eighteen months after the date of enactment of this section [enacted Oct. 21, 1976] and after notice and hearing, the Administrator shall, after consultation with appropriate Federal, State, and local authorities, promulgate regulations containing guidelines to assist in the development and implementation of State solid waste management plans (hereinafter in this title [42 USCS §§ 6901 et seq.] referred to as "State plans"). The guidelines shall contain methods for achieving the objectives specified in section 4001 [42 USCS § 6941]. Such guidelines shall be reviewed from time to time, but not less frequently than every three years, and revised as may be appropriate.

(c) Considerations for State plan guidelines. The guidelines promulgated under subsection (b) shall consider –

(1) The varying regional, geologic, hydrologic, climatic, and other circumstances under which different solid waste practices are required in order to insure the reasonable protection of the quality of the ground and surface waters from

leachate contamination, the reasonable protection of the quality of the surface waters from surface runoff contamination, and the reasonable protection of ambient air quality;

(2) characteristics and conditions of collection, storage, processing, and disposal operating methods, techniques and practices, and location of facilities where such operating methods, techniques, and practices are conducted taking into account the nature of the material to be disposed;

(3) methods for closing or upgrading open dumps for purposes of eliminating potential health hazards;

(4) population density, distribution, and projected growth;

(5) geographic, geologic, climatic, and hydrologic characteristics;

(6) the type and location of transportation;

(7) the profile of industries;

(8) the constituents and generation rates of waste;

(9) the political, economic, organizational, financial, and management problems affecting comprehensive solid waste management;

(10) types of resource recovery facilities and resource conservation systems which are appropriate; and

(11) available new and additional markets for recovered material and energy and energy resources recovered from solid waste as well as methods for conserving such materials and energy.

§ 6943. Requirements for approval of plans

(a) Minimum Requirements. In order to be approved under section 4007 [42 USCS § 6947], each State plan must comply with the following minimum requirements –

(1) The plan shall identify (in accordance with section 4006(b) [42 USCS § 6946(b)]) (A) the responsibilities of State, local, and regional authorities in the implementation of the State plan, (B) the distribution of Federal funds to the authorities responsible for development and implementation of the State plan, and (C) the means for coordinating regional planning and implementation under the State plan.

(2) The plan shall, in accordance with sections 4004(b) and 4005(a) [42 USCS §§ 6944(b), 6945(a)], prohibit the establishment of new open dumps within the State, and contain requirements that all solid waste (including solid waste originating in other States, but not including hazardous waste) shall be (A) utilized for resource recovery or (B) disposed of in sanitary landfills (within the meaning of section 4004(a) [42 USCS § 6944(a)]) or otherwise disposed of in an environmentally sound manner.

(3) The plan shall provide for the closing or upgrading of all existing open dumps within the State pursuant to the requirements of section 4005 [42 USCS § 6945].

(4) The plan shall provide for the establishment of such State regulatory powers as may be necessary to implement the plan.

(5) The plan shall provide that no State or local government within the State shall be prohibited

under State or local law from negotiating and entering into long-term contracts for the supply of solid waste to resource recovery facilities, from entering into long-term contracts for the operation of such facilities, or from securing long-term markets for material and energy recovered from such facilities or for conserving materials or energy by reducing the volume of waste.

(6) The plan shall provide for such resource conservation or recovery and for the disposal of solid waste in sanitary landfills or any combination of practices so as may be necessary to use or dispose of such waste in a manner that is environmentally sound.

(b) Discretionary plan provisions relating to recycled oil. Any State plan submitted under this subtitle [42 USCS §§ 6941 et seq.] may include, at the option of the State, provisions to carry out each of the following:

(1) Encouragement, to the maximum extent feasible and consistent with the protection of the public health and the environment, of the use of recycled oil in all appropriate areas of State and local government.

(2) Encouragement of persons contracting with the State to use recycled oil to the maximum extent feasible, consistent with protection of the public health and the environment.

(3) Informing the public of the uses of recycled oil.

(4) Establishment and implementation of a program (including any necessary licensing of

persons and including the use, where appropriate of manifests) to assure that used oil is collected, transported, treated stored, reused, and disposed of, in a manner which does not present a hazard to the public health or the environment.

Any plan submitted under this title [42 USCS §§ 6901 et seq.] before the date of the enactment of the Used Oil Recycling Act of 1980 may be amended, at the option of the State, at any time after such date to include any provision referred to in this subsection.

(c) **Energy and materials conservation and recovery feasibility planning and assistance.** (1) A State which has a plan approved under this subtitle [42 USCS §§ 6941 et seq.] or which has submitted a plan for such approval shall be eligible for assistance under section 4008(a)(3) [42 USCS § 6948(a)(3)] if the Administrator determines that under such plan the State will –

(A) analyze and determine the economic and technical feasibility of facilities and programs to conserve resources which contribute to the waste stream or to recover energy and materials from municipal waste;

(B) analyze the legal, institutional, and economic impediments to the development of systems and facilities for conservation of energy or materials which contribute to the waste stream or for the recovery of energy and materials from municipal waste and make recommendations to appropriate governmental authorities for overcoming such impediments;

(C) assist municipalities within the State in developing plans, programs, and projects to conserve resources or recover energy and materials from municipal waste; and

(D) coordinate the resource conservation and recovery planning under subparagraph (C).

(2) The analysis referred to in paragraph (1)(A) shall include –

(A) the evaluation of, and establishment of priorities among, market opportunities for industrial and commercial users of all types (including public utilities and industrial parks) to utilize energy and materials recovered from municipal waste;

(B) comparisons of the relative costs of energy recovered from municipal waste in relation to the costs of energy derived from fossil fuels and other sources;

(C) studies of the transportation and storage problems and other problems associated with the development of energy and materials recovery technology, including curbside source separation;

(D) the evaluation and establishment of priorities among ways of conserving energy or materials which contribute to the waste stream;

(E) comparison of the relative total costs between conserving resources and disposing of or recovering such waste; and

(F) studies of impediments to resource conservation or recovery, including business practices, transportation requirements, or storage difficulties.

Such studies and analyses shall also include studies of other sources of solid waste from which energy and materials may be recovered or minimized.

(d) Size of waste-to-energy facilities. Notwithstanding any of the above requirements, it is the intention of this [42 USCS §§ 6901 et seq.] Act and the planning process developed pursuant to this Act [42 USCS §§ 6901 et seq.] that in determining the size of the waste-to-energy facility, adequate provision shall be given to the present and reasonably anticipated future needs of the recycling and resource recovery interest within the area encompassed by the planning process.

§ 6944. Criteria for sanitary landfills; sanitary landfills required for all disposal

(a) Criteria for sanitary landfills. Not later than one year after the date of enactment of this section [enacted Oct. 21, 1976], after consultation with the States, and after notice and public hearings, the Administrator shall promulgate regulations containing criteria for determining which facilities shall be classified as sanitary landfills and which shall be classified as open dumps within the meaning of this Act [42 USCS §§ 6901 et seq.]. At a minimum, such criteria shall provide that a facility may be classified as a sanitary landfill and not an open dump only if there is no reasonable probability of adverse effects on health or the environment from disposal of solid waste at such

facility. Such regulations may provide for the classification of the types of sanitary landfills.

(b) Disposal required to be in sanitary landfills, etc. For purposes of complying with section 4003(2) [42 USCS § 6943(2)] each State plan shall prohibit the establishment of open dumps and contain a requirement that disposal of all solid waste within the State shall be in compliance with such section 4003(2) [42 USCS § 6943(2)].

(c) Effective date. The prohibition contained in subsection (b) shall take effect on the date six months after the date of promulgation of regulations under subsection (a).

§ 6945. Upgrading of open dumps

(a) Closing or upgrading of existing open dumps. Upon promulgation of criteria under section 1008(a)(3) [42 USCS § 6907(a)(3)], any solid waste management practice or disposal of solid waste or hazardous waste which constitutes the open dumping of solid waste or hazardous waste is prohibited, except in the case of any practice or disposal of solid waste under a timetable or schedule for compliance established under this section. The prohibition contained in the preceding sentence shall be enforceable under section 7002 [42 USCS § 6972] against persons engaged in the act of open dumping. For purposes of complying with section 4003(2) and 4003(3) [42 USCS § 6943(a)(2), (3)], each State plan shall contain a requirement that all existing disposal facilities or sites for solid waste in such State which are open dumps listed in the inventory under subsection (b) shall comply with such measures as may be promulgated by the Administrator to eliminate health hazards and minimize potential

health hazards. Each such plan shall establish, for any entity which demonstrates that it has considered other public or private alternatives for solid waste management to comply with the prohibition on open dumping and is unable to utilize such alternatives to so comply, a timetable or schedule for compliance for such practice or disposal of solid waste which specifies a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with the prohibition on open dumping of solid waste within a reasonable time (not to exceed 5 years from the date of publication of criteria under section 1008(a)(3) [42 USCS § 6907(a)(3)]).

(b) Inventory. To assist the States in complying with section 4003(3) [42 USCS § 6943(a)(3)], not later than one year after promulgation of regulations under section 4004 [42 USCS § 6944], the Administrator, with the cooperation of the Bureau of the Census shall publish an inventory of all disposal facilities or sites in the United States which are open dumps within the meaning of this Act [42 USCS §§ 6901 et seq.].

(c) Control of Hazardous disposal. (1)(A) Not later than 36 months after the date of enactment of the Hazardous and Solid Waste Amendments of 1984 [enacted Nov. 8, 1984], each State shall adopt and implement a permit program or other system of prior approval and conditions to assure that each solid waste management facility within such State which may receive hazardous household waste or hazardous waste due to the provision of section 3001(d) [42 USCS § 6921(d)] for small quantity generators (otherwise not subject to the requirement for a permit under section 3005 [42 USCS § 6925]) will comply

with the applicable criteria promulgated under section 4004(a) and section 1008(a)(3) [42 USCS § 6944(a), 6907(a)(3)].

(B) Not later than eighteen months after the promulgation of revised criteria under subsection 4004(a) [42 USCS § 6944(a)] (as required by section 4010(c) [42 USCS § 6949a(c)]), each State shall adopt and implement a permit program or other system or prior approval and conditions, to assure that each solid waste management facility within such State which may receive hazardous waste or hazardous waste due to the provision of section 3001(d) [42 USCS § 6921(d)] for small quantity generators (otherwise not subject to the requirement for a permit under section 3005 [42 USCS § 6925]) will comply with the criteria revised under section 4004(a) [42 USCS § 6944(a)].

(C) The Administrator shall determine whether each State has developed an adequate program under this paragraph. The Administrator may make such a determination in conjunction with approval, disapproval or partial approval of a State plan under section 4007 [42 USCS § 6947].

(2)(A) In any State that the Administrator determines has not adopted an adequate program for such facilities under paragraph (1)(B) by the date provided in such paragraph, the Administrator may use the authorities available under section 3007 and 3008 of this title [42 USCS §§ 6927, 6928] to enforce the prohibition contained in subsection (a) of this section with respect to such facilities.

(B) For purposes of this paragraph, the term "requirement of this subtitle [42 USCS §§ 6941 et seq.]" in section 3008 [42 USCS § 6928] shall be deemed to include criteria promulgated by the Administrator under sections 1008(a)(3) and 4004 (a) of this title [42 USCS §§ 6907(a)(3), 6944(a)], and the term "hazardous wastes" in section 3007 [42 USCS § 6927] shall be deemed to include solid waste at facilities that may handle hazardous household wastes or hazardous wastes from small quantity generators.

§ 6946. Procedure for development and implementation of State plan

(a) Identification of regions. Within one hundred and eighty days after publication of guidelines under section 4002(a) [42 USCS § 6942(a)] (relating to identification of regions), the Governor of each State, after consultation with local elected officials, shall promulgate regulations based on such guidelines identifying the boundaries of each area within the State which, as a result of urban concentrations, geographic conditions, markets, and other factors, is appropriate for carrying out regional solid waste management. Such regulations may be modified from time to time (identifying additional or different regions) pursuant to such guidelines.

(b) Identification of State and local agencies and responsibilities. (1) Within one hundred and eighty days after the Governor promulgates regulations under subsection (a), for purposes of facilitating the development and implementation of a State plan which will meet the minimum requirements of section 4003 [42 USCS § 6943], the State, together with appropriate elected officials of

general purpose units of local government, shall jointly (A) identify an agency to develop the State plan and identify one or more agencies to implement such plan, and (B) identify which solid waste management activities will, under such State plan, be planned for and carried out by the State and which such management activities will, under such State plan, be planned for and carried out by a regional or local authority or a combination of regional or local and State authorities. If a multi-functional regional agency authorized by State law to conduct solid waste planning and management (the members of which are appointed by the governor) is in existence on the date of enactment of this Act [enacted Oct. 21, 1976], the Governor shall identify such authority for purposes of carrying out within such region clause (A) of this paragraph. Where feasible, designation of the agency for the affected area designated under section 208 of the Federal Water Pollution Control Act (86 Stat 839) [33 USCS § 1288] shall be considered. A State agency identified under this paragraph shall be established or designated by the Governor of such State. Local or regional agencies identified under this paragraph shall be composed of individuals at least a majority of whom are elected local officials.

(2) If planning and implementation agencies are not identified and designated or established as required under paragraph (1) for any affected area, the governor shall, before the date two hundred and seventy days after promulgation of regulations under subsection (a), establish or designate a State agency to develop and implement the State plan for such area.

(c) Interstate regions. (1) In the case of any region which, pursuant to the guidelines published by the Administrator under section 4002(a) [42 USCS § 6942(a)] (relating to identification of regions), would be located in two or more States, the Governors of the respective States, after consultation with local elected officials, shall consult, cooperate, and enter into agreements identifying the boundaries of such region pursuant to subsection (a).

(2) Within one hundred and eighty days after an interstate region is identified by agreement under paragraph (1), appropriate elected officials of general purpose units of local government within such region shall jointly establish or designate an agency to develop a plan for such region. If no such agency is established or designated within such period by such officials, the governors of the respective States may, by agreement, establish or designate for such purpose a single representative organization including elected officials of general purpose units of local government within such region.

(3) Implementation of interstate regional solid waste management plans shall be conducted by units of local government for any portion of a region within their jurisdiction, or by multijurisdictional agencies or authorities designated in accordance with State law, including those designated by agreement by such units of local government for such purpose. If no such unit, agency, or authority is so designated, the respective Governors shall designate or establish a single interstate agency to implement such plan.

(4) For purposes of this subtitle [42 USCS §§ 6941 et seq.], so much of an interstate regional plan as is carried

out within a particular State shall be deemed part of the State plan for such State.

§ 6947. Approval of State plan; Federal assistance

(a) Plan approval. The Administrator shall, within six months after a State plan has been submitted for approval, approve or disapprove the plan. The Administrator shall approve a plan if he determines that –

(1) it meets the requirements of paragraphs (1), (2), (3), and (5) of section 4003 [42 USCS § 6943(a)(1), (2), (3), (5)]; and

(2) it contains provision for revision of such plan, after notice and public hearing, whenever the Administrator, by regulation, determines –

> (A) that revised regulations respecting minimum requirements have been promulgated under paragraphs (1), (2), (3), and (5) of section 4003 [42 USCS § 6943(a)(1), (2), (3), (5)] with which the State plan is not in compliance;
>
> (B) That information has become available which demonstrates the inadequacy of the plan to effectuate the purposes of this subtitle [42 USCS §§ 6941 et seq.]; or
>
> (C) that such revision is otherwise necessary.

The Administrator shall review approved plans from time to time and if he determines that revision or corrections are necessary to bring such plan into compliance with the minimum requirements promulgated under section 4003 [42 USCS § 6943] (including new or revised requirements), he shall, after notice and opportunity for public

hearing, withdraw his approval of such plan. Such withdrawal of approval shall cease to be effective upon the Administrator's determination that such complies with such minimum requirements.

(b) Eligibility of States for Federal financial assistance. (1) The administrator shall approve a state application for financial assistance under this subtitle (42 USCS §§ 6941 et seq.], and make grants to such State, if such State and local and regional authorities within such State have complied with the requirements of section 4006 [42 USCS § 6946] within the period required under such section and if such State has a State plan which has been approved by the Administrator under this subtitle [42 USCS §§ 6941 et seq.].

(2) The Administrator shall approve a State application for financial assistance under this subtitle [42 USCS §§ 6941 et. seq.], and make grants to such State, for fiscal years 1978 and 1979 if the Administrator determines that the State plan continues to be eligible for approval under subsection (a) and is being implemented by the State.

(3) Upon withdrawal of approval of a State plan under subsection (a), the Administrator shall withhold Federal financial and technical assistance under this subtitle [42 USCS §§ 6921 et seq.] (other than such technical assistance as may be necessary to assist in obtaining the reinstatement of approval) until such time as such approval is reinstated.

(c) Existing activities. Nothing in this subtitle [42 USCS §§ 6941 et seq.] shall be construed to prevent or affect any activities respecting solid waste planning or management

which are carried out by State, regional, or local authorities unless such activities are inconsistent with a State plan approved by the Administrator under this subtitle [42 USCS §§ 6941 et seq.].

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF ENNIS, TEXAS, CITY OF ITALY, TEXAS, AND COUNTY OF ELLIS, TEXAS, Defendants.	CIVIL ACTION NO. 3:92-CV-1053-R CONSOLIDATED WITH: 3:92-CV-1015-D 3:92-CV-1016-J 3:92-CV-1069-P
CITY OF ENNIS, TEXAS, CITY OF ITALY, TEXAS, AND COUNTY OF ELLIS, TEXAS, Plaintiffs, v. ALLWASTE ENVIRONMENTAL SERVICES OF TEXAS, INC. Defendants.	

AGREED ORDER

(Filed Sept. 23, 1992)

Upon Amended Motion of the United States for an Order in Aid of Immediate Access, Temporary Restraining Order, Preliminary Injunction, and Declaratory Judgment, and the Memorandum in Support thereof; and upon Hearing on said Motion, on June 1, 1992, this Court

issued a Temporary Restraining Order prohibiting the Cities of Ennis and Italy, Texas and the County of Ellis, Texas ("Defendants") from interfering with the United States Environmental Protection Agency's ("EPA") and consolidated Defendant Allwaste Environmental Services of Texas, Inc.'s right of entry and access to certain public roads within said cities and county and the C.S.C. Disposal and Landfill, Inc. in Ellis County, Texas; the result of the Defendants interference being to further impede cleanup activities at the West Dallas Lead (RSR) Site (West Dallas Site) by impeding off-site disposal of soil and debris from West Dallas at the C.S.C. Disposal and Landfill, Inc. facility in Avalon, Ellis County Texas.

By agreement of the parties and upon two Joint Motions to Extend the Temporary Restraining Order and Reset Hearing on Preliminary Injunction, this Court issued two Orders extending the Temporary Restraining Order from May 28, 1992 to the date of this Order.

The parties have agreed, and the Court hereby orders, the entry of a Permanent Injunction based on the following:

The United States submits as follows:

1. The residents of West Dallas living in and around the West Dallas Site are exposed to high levels of lead which have been released from the RSR smelter facility and have contaminated the neighborhood in the vicinity of the smelter, including soil surrounding homes, schools and parks. Lead is a hazardous substance under the Comprehensive Environmental Response Compensation and Liability Act, 42 U.S.C. § 9601 *et seq.* (CERCLA). Continued exposure to lead at the West Dallas Site poses

an imminent and substantial danger to the health and welfare of the residents of the West Dallas Site, particularly children. In order to abate this imminent and substantial danger, EPA has undertaken a response action in accordance with Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), which involves excavation and off-site disposal of the contaminated soil and debris from the West Dallas area. Depending on the lead level in the excavated soil, the material is classified as either "hazardous waste" or "non-hazardous waste" under the criteria prescribed by the Resource Conservation and Recovery Act, 42 U.S.C. § 6901 *et seq.* (RCRA). Because of the limited storage capacity at the RSR smelter facility for RCRA non-hazardous soil and debris, this material must be disposed of off-site in an appropriate disposal facility. Unless this soil and debris is hauled off-site for disposal, the imminent and substantial danger to the citizens of West Dallas cannot be abated.

2. The West Dallas Site response action is lawful and that transportation of the RCRA non-hazardous soil and debris from the West Dallas Site to the C.S.C. Disposal and Landfill, Inc., and disposal at said facility, will be carried out in a safe and secure manner which poses no risk of harm to anyone along the transportation route or at the landfill facility.

3. The United States has the legal authority pursuant to Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), to respond to the release of hazardous substances at the West Dallas Site in order to protect public health and welfare.

4. The United States has the legal authority pursuant to Section 104(e) of CERCLA, 42 U.S.C. § 9604(e), to obtain access to any property necessary to effectuate a response action, such as the response action at the West Dallas Site.

5. The public interest favors the protection of the public health and safety, the open use of the highways for commerce, and the assertion of federal authority over response actions involving an imminent and substantial danger to human health and the environment of the citizens of West Dallas.

6. Pursuant to Section 113(b) of CERCLA, this Court has exclusive original jurisdiction and venue to resolve the disputes between the United States Environmental Protection Agency, Allwaste Environmental Services of Texas, Inc. and the Defendants and, except as otherwise limited by CERCLA, all other controversies arising under CERCLA involving the West Dallas Site.

7. This Court has the jurisdiction and authority to issue this Order pursuant to Sections 104 and 113 of CERCLA, 42 U.S.C. §§ 9604, 9613, the All Writs Act, 28 U.S.C. § 1651, and the Commerce Clause of the United States Constitution. The fundamental issue is one of protection of the public health and safety.

Defendant submits as follows:

8. Defendants do not agree to or admit any findings, conclusions or statements of fact or law set forth above.

9. Defendants have developed and submitted to the State of Texas an Emergency Response Plan (February 26,

1991) as required under the Texas Disaster Act, Tex. Gov't. Code, Ann. § 418, (Vernon 1988) and under Section 303 of the Emergency Planning and Community Right-to-Know Act (EPCRTKA), 42 U.S.C. § 11003.

NOW THEREFORE, before taking any testimony on the United States' Amended Motion for an Order in Aid of Immediate Access, without adjudication of any issue of fact or law, and upon the consent and agreement of the parties hereto it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. For the portion of the response action at the West Dallas Site involving off-site disposal, Defendants are enjoined from denying any officer, employee or representative of EPA, its contractors and subcontractors, entry and access to the C.S.C. Disposal and Landfill, Inc., Ellis County, Texas, and to the following public roads within said cities and county: Interstate Highway 45, Interstate Highway 35E, and State Highway 34, Farm-to-Market Road 55 and Powell Road;

2. For the portion of the response action at the West Dallas Site involving off-site disposal, Defendants are enjoined from acting to impede, obstruct or interfere in any way with EPA's, its contractors' and subcontractors' effectuation of its response action at the West Dallas Site pursuant to Section 104(a)(1) of CERCLA, 42 U.S.C. § 9604(a)(1);

3. For the portion of response action at the West Dallas Site involving off-site disposal, the United States shall provide Defendants with reasonable notice of EPA's plans to transport the RCRA non-hazardous soil and

debris from the West Dallas Site to the C.S.C. Disposal and Landfill in Ellis County, Texas;

4. For the portion of the response action at the West Dallas Site involving off-site disposal, Allwaste Environmental Services of Texas, Inc. shall comply with permits necessary for and laws governing the transportation of the RCRA non-hazardous soil and debris from the West Dallas Site;

5. The C.S.C. Disposal and Landfill, Inc. in Ellis County, Texas represents that it is operating in compliance with permits necessary for and laws governing the storage and disposal of the RCRA non-hazardous soil and debris from the West Dallas Site. For the portion of the response action at the West Dallas Site involving off-site disposal, the Landfill facility shall continue to maintain and operate in compliance with said permits and laws as necessary for the continued receipt of the RCRA non-hazardous waste;

6. This Order shall be binding upon all parties, their agents, servants, employees, officials, attorneys, and those in active concert or participation with them who received actual notice of this Order;

7. Any pending motions to remand by the Cities of Ennis and Italy and the County of Ellis, Texas are hereby denied.

8. The parties agree to stay any further proceedings in this action except those proceedings required to enforce this Order.

9. The parties agree that upon completion of the response action at the West Dallas Site, all of the cases subject to this Agreed Order shall be dismissed as moot.

SO ORDERED THIS 23 day of September, 1992.

/s/ Jerry Buchmeyer
JERRY BUCHMEYER
UNITED STATES
DISTRICT JUDGE

The undersigned agree to entry of the above ORDER, both as to form and as to substance.

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